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In the Supreme Court of the United States

No. _____

JOHN KENNETH SUTTON

-V-

STATE OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the Oklahoma Court of Criminal Appeals has improperly constructed the statutes at issue and improperly abrogated the common law age of consent in violation of the principles upon which the Ex Post Facto Clause of the Constitution are based.

2. In the alternative, whether the statutory provisions contained within the *Oklahoma's Child Abuse Reporting and Prevention Act* are impermissibly vague and thereby unconstitutional.

Parties to the Proceedings

Petitioner is John Kenneth Sutton. Respondent is the Oklahoma Court of Criminal Appeals.

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Opinions Below

The judgment (App. 45) of the District Court of Mayes County, Oklahoma overruling Petitioner's motion (App.6) and amended motion (App. 22) for demurrer is unreported. The verdict of the District Court of Mayes County, Oklahoma is unreported (App.47). The Summary Opinion of the Oklahoma Court of Criminal Appeals affirming Petitioner's conviction is unreported (App. 112). The order (App. 128) denying Petitioner's request for rehearing (App. 114) is unreported.

Jurisdiction

The judgment of the Oklahoma Court of Criminal Appeals[1] was entered on March 27 2008 (App. 112). A petition for rehearing was denied on April 29 2008 (App. 128). Petitioner presents his *Petition for Writ of Certiorari* within ninety days of the denial of his petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(1).

Constitutional and Statutory Provisions Involved

The Ex Post Facto Clause of the United States Constitution provides that "[n]o bill of attainder or ex post facto law shall be passed" (U.S. Const. art. 1 §

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[1] The Oklahoma Court of Criminal Appeals is the highest court in the State of Oklahoma with appellate jurisdiction over criminal cases

9). The Fifth and Fourteenth Amendments to the United States Constitution provide that no person may be "deprived of life, liberty, or property, without due process of law..." An Individual charged with a crime has the right "...to be informed of the nature and cause of the accusation..." against him (U.S. Const. amend. VI). The pertinent provisions of the state statutes at issue are contained within the *Oklahoma Child Abuse Reporting and Prevention Act*, in particular, Tit. 10 OS (2005) § 7102 and Tit. 10 OS (2002) § 7115 (copies attached as App. 138 and App. 146). These statutes cite to other unidentified law to define the crime of sexual abuse, (copies of what is presumed to be the unidentified law is attached at App. 138 – App. 172).

Concise Statement of the Case

A. Introduction

Through a trial by jury, Mr. Sutton has been convicted of felony child sexual abuse, sentenced to 6 months in the county jail and ordered to pay a $3,000.00 fine. Prosecutrix, ML, was seventeen years old and Mr. Sutton's stepdaughter at the time of the supposed incidents. There are no allegations of Mr. Sutton using any force, fear, intimidation or coercion to accomplish the acts alleged. The alleged acts were consensual. Mr. Sutton, who is a lifelong resident of Oklahoma, fifty years of age and who has no prior arrests of any kind, has been wrongfully convicted in violation of his rights to due process.

On appeal, Mr. Sutton elects to pursue those arguments concerning whether his due process rights have been violated. Because of the manner in which the Oklahoma child sexual abuse laws are written, the law does not yet define the acts complained of to constitute a crime. Mr. Sutton's conviction has been upheld by the Oklahoma Court of Criminal Appeals because of an improper statutory construction and an improper abrogation of the common law right to consent. These errors of the Court have resulted in a substantial violation of the principles upon which the Ex Post Facto Clause of the Constitution is based. In the alternative, the statutes at issue are void for vagueness. In either event, Mr. Sutton's conviction should be reversed and this matter dismissed from any further prosecution.

B. Course of Proceedings and Disposition

1. On March 22 2006, Mr. Sutton was charged with felony child sexual abuse, in violation of Tit. 10 OS § 7115. The charges are based upon allegations that Mr. Sutton:

> [W]illfully engage[ed] in child sexual abuse of ML, age 17 years old at the time, by intentionally fondling the breasts of ML in a lewd and lascivious manner with his hands and by inserting his finger into the vagina of ML, age 17 years old, when the said Defendant was over the age of eighteen (18) years and responsible for the welfare of ML (See App. 3)

2. Mr. Sutton filed his Demurrer (App. 6) and Amended Demurrer (App. 22) to the Information on February 2 2007, both of which were denied by the Trial Court on February 5 2007 (App. 45). The federal questions presently at issue were raised by Mr. Sutton's Demurrers. The Trial Court's ruling assumes that the age of consent for sexual relations has been elevated to 18 years of age in circumstances involving members of the same household. Its assumption is based upon Its beliefs as to the "intended purposes" and "implied" mandates of Tit. 10 OS § 7102, 7115 and et seq.

3. Trial proceedings were stayed until February 7 2007 in order to allow Mr. Sutton an opportunity to seek a Writ from the Oklahoma Court of Criminal Appeals. Mr. Sutton filed his Application for Suspension of the Ten Day Rule with the Oklahoma Court of Criminal Appeals in order to have his Writ heard. Mr. Sutton's Application was denied and his Writ refused because of the Ten Day Rule.

4. This matter was tried before a jury on the 7, 8, 9 and 12 days of February 2007. On February 12 2007, the jury found Mr. Sutton guilty of the crime of child sexual abuse and sentenced him to 6 months in the Mayes County Jail. Mr. Sutton was also fined $3,000.00 (App. 47).

5. On appeal, Mr. Sutton again raised and expanded upon the federal questions of law presently at issue. Mr. Sutton's conviction was upheld by

Summary Opinion of the Oklahoma Court of Criminal Appeals issued March 27 2008 (App. 112). Mr. Sutton's Petition for rehearing was denied on April 29 2008 (App. 128). The Oklahoma Court of Criminal Appeals sustained Mr. Sutton's conviction because It believes that the language of Tit. 10 OS (2002) § 7115 "clearly modifies the age of consent...to 18 years of age when the crime is committed by someone responsible for the child's health, safety or welfare." Mr. Sutton has exhausted his state remedies.

6. This matter should be overturned with instructions to dismiss because no crime was alleged within the State's Information inasmuch as the charge is premised upon a misinterpretation of Tit. 10 O.S. § 7102 and 7115. In the alternative, Tit. 10 OS § 7102 and 7115 are void for vagueness. The verdict against Mr. Sutton should be reversed and these proceedings dismissed.

C. Statement of Facts From the Trial

ML is a seventeen-year-old stepdaughter of Mr. Sutton at the time of the alleged incidents (Trial Transcript of the proceedings, "TR", Pg. 399 and 669). ML is also a senior in high school and an active member of her school's German club, choir and band (TR, Pg. 367). ML carries a 4.0 grade point average at the time of the alleged incidents (TR, Pg. 456). Not one of ML's personal relationships suffered during the time of the alleged incidents (TR, Pg. 456). ML leaves her mother's home – not because of the alleged

leaves her mother's home – not because of the alleged incidents – but because of a disagreement she was having with her mother (See, i.e., TR, Pg. 422 and 456). In fact, even after ML left her mother's home, she continued to stay in contact with Mr. Sutton, bringing him cookies and sitting next to him at a family Christmas gathering (TR, Pg. 512; TR, Pg. 783; and, Defendant's Exhibit No. 5).

ML and her family had a nightly routine for going to bed (Preliminary Hearing transcript of the proceedings, "PH", Pg. 11). It started with ML and her two siblings climbing into ML's bed (See, i.e., PH, Pg. 9). ML, or one of her two younger siblings would then holler out for Mr. or Mrs. Sutton and ask that they tuck them in (See, i.e., TR, Pg. 390 and 466). Mr. and sometimes Mrs. Sutton would then go into ML's room, say goodnight and talk about the day/events in general (PH, Pg. 11-12). Mr. Sutton would also scratch backs if he was asked (PH, Pg. 12). ML always slept on the side of the bed closest to her bedroom door (TR, Pg. 489). ML claims that the alleged incidents happened during this nightly routine.

i. The First Alleged Incident:

ML claims that she is in her bed with her two siblings[2] present and the family is going through

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[2] Both of ML's siblings were present at trial and testified. Both of her siblings testified that they had not seen or heard anything out of the ordinary during the time of the alleged incidents (TR, Pg. 820-833; and, 833-844). BL, is ML's younger

their nightly routine (PH, Pg. 10-13). ML is lying face down on the bed, with her hands at her side when she asks Mr. Sutton to scratch her back (PH, Pg. 13-14). ML claims that while scratching her back, Mr. Sutton "touched the side of [her] boob and touched the inside of [her] thigh" (PH, Pg. 13-14). ML does not remember which of her breasts are touched (PH, Pg. 14). ML does not remember if her breast is touched before or after her thigh is touched (PH, Pg. 15). At trial, ML testified that she believed the breast touching was actually an accident (TR, Pg. 498-499). ML could not say for certain that Mr. Sutton had ever touched her breast; she thought he "[j]ust got really close" (PH, Pg. 14).

At the time of this incident, ML and Mr. Sutton were engaged in a conversation (PH, Pg. 16). ML did not say anything to Mr. Sutton about this alleged incident (PH, Pg. 49). ML did not tell anyone about this alleged incident (PH, Pg. 17).

ii. Alleged Penetration Incidents:

ML claims that after the first incident, Mr. Sutton progressed to placing his finger into her vagina. When asked how many times this occurred, ML says "it wasn't a lot. [b]ut it was more than three or four" (PH, Pg. 58). At trial, ML claims first that it happened "a couple" of times (TR, Pg. 413). Then she

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sister – she was 10 years old at the time of the alleged incidents. RL is ML's younger brother – he was 11 years old at the time of the alleged incidents.

said, it happened "more than two or three" times (TR, Pg. 492).

ML claims that each of the alleged penetration incidents happened the same way (PH, Pg. 18-19 and 54; and, TR, Pg. 416 and 472). The alleged incidents always took place at night and only in ML's bedroom (TR, Pg. 416 and PH, Pg. 42). ML's mom is always home, usually in mom's bedroom or the living room (TR, Pg. 417). ML is not sure if her siblings are awake but they are in her bed (PH, Pg. 54). ML is always laying face down (PH, pg. 26). Her legs are always "slightly apart" or "slightly open" (PH, Pg. 22 and 29; and, TR, Pg. 408 and 472). She is always wearing underwear and shorts/pants (PH, Pg. 52). ML is looking in the direction of Mr. Sutton (See, i.e., PH, Pg. 21). Mr. Sutton is always beside her bed sitting down (PH, Pg. 19 and 25). Mr. Sutton is then supposed to go under ML's clothing and place his finger inside ML's vagina (PH, Pg. 21). Mr. Sutton's finger does not do anything while inside of ML (TR, Pg. 409). While Mr. Sutton's finger is supposedly inside ML, Mr. Sutton and ML are engaged in conversation with one another – talking about school, events of the day, etc. (See, i.e., PH, Pg. 57). ML states that after each of the alleged incidents "if we were talking we would finish what we were talking about, then good-night, I love you, and we would go to bed." (PH, Pg. 57) ML further says that although she was talking with Mr. Sutton at the time of the alleged incidents and she was not afraid of him, she did not tell Mr. Sutton no or to stop (PH, Pg. 57).

ML told a number of people about her alleged rendezvous with Mr. Sutton, including her Father, Steve Lemmings[3]; her stepmother, Tammy Lemmings; her former boyfriend Jake Marlin; her sister, Traci Hager; her boyfriend, Jesse Muhlee; her youth minister, Chris Fields; a counselor, Sue Warwick; DHS representatives; and other Pryor Police Officers. The nature of the information ML provides to each person and that person's reaction to the information, is essentially as follows:

A. *Steve Lemmings* – Steve Lemmings is ML's natural father and an investigator with the Pryor Police Department who investigates sexual abuse crimes (TR, Pg. 369-370; and, 480). When ML tells Steve Lemmings of the alleged incident, Tammy Lemmings and ML's boyfriend, Jake, are also present (TR, Pg. 430). ML states that she told Investigator Lemmings the night after she moved out of her mom's house in May 2005 (PH, Pg. 35-36). ML told Investigator Lemmings that "something had happened between me and Johnny that shouldn't have, and it made me really uncomfortable and that's part of the reason why I moved out." (PH, Pg. 63). Investigator Lemmings asked questions of ML for more details, but she refused to provide them (PH, Pg 63). Without knowing any of the details,

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[3]. Each of the incidents complained of allegedly took place in Pryor, Oklahoma (See, i.e., TR, Pg. 363).

Investigator Lemmings supposedly wanted ML to contact DHS, and ML's mother to protect ML's sister. ML contacted no one suggested by her father (PH, Pg 62-63; See Also, TR, 431-432). Investigator Lemmings, as a sexual abuse investigator and the father of ML, did nothing other than to suggest to ML that she "needed to tell somebody" (TR, Pg. 432 and 942). Investigator Lemmings also told ML that in deciding whether to "tell somebody" she needed to think of her younger sister, Bethanie, who was still residing with her mother and the Defendant (Tr., Pg. 432). After this initial conversation in May 2005 with ML, Investigator Lemmings never raised the subject with ML again (Tr., Pg. 433).

B. *Traci Hager* – Traci Hager is ML's sister (TR, Pg. 426). During portions of her testimony, ML claims Traci was the first person she told (TR Pg. 426 and 429-430). During other portions, ML claims that she told Traci second or third (TR, Pg. 463 and 464). Her conversation with Traci was over the phone, from her father's home, almost two weeks after she moved into her father's home (Tr., Pg. 425-426). ML told Traci "[j]ust that something happened between me and Johnny, that shouldn't have" (TR, Pg. 426). ML provided no other details, but felt that Traci should know because they

used to be close to one another (TR, Pg. 427). Upon further prodding of the State, ML remembered that she told Traci "something happened" out of concern for Traci's two daughters (TR, Pg. 427).

C. *Jake Marlin* – Jake Marlin is a former boyfriend of ML (TR, Pg. 413-414). ML claims to have told Mr. Marlin around Christmas 2005, sometime after the first alleged incident but before the second alleged incident (TR, Pg. 413). ML claims that she told Mr. Marlin because she "was going to start asking somebody to be home with [her] after school. That way on the days that he was home, [she] wasn't there with him by [herself]." (PH, Pg. 34) In response to a follow up question, ML stated that not one of the alleged incidents occurred after school (PH, Pg. 35). In response to further questioning, ML claims that Mr. Sutton never did "anything that made [her] feel uncomfortable when [she] would be home alone with him." (PH, Pg. 36). At the time of trial, ML claims to have told Mr. Marlin of the alleged incidents without providing any detail. In response, Mr. Marlin allegedly instructs ML to tell her mom and DHS and ML does neither (TR, Pg. 414-415).

D. *Jesse Muhlee* – Jesse Muhlee is a current boyfriend of ML (TR, Pg. 433). ML testified

that she told Mr. Muhlee while she was in a car with him "[j]ust that some stuff had happened." (TR, Pg. 434). ML provided no detail, but was instructed by Mr. Muhlee "to talk with somebody" – to talk with her youth minister, Chris Fields (TR, Pg. 434-435).

E. *Chris Fields* – Chris Fields is ML's youth minister. ML testified at trial that she told Mr. Fields "things happened between me and Johnny that shouldn't have happened", but that she provided no detail (TR, Pg. 436). During cross-examination, ML states that she told Mr. Fields about Mr. Sutton touching her breast(s) (TR, Pg. 498). Later on, ML explains that she believed the breast touching was actually an accident (TR, Pg. 498-499). In fact, at the time of the preliminary hearing, ML could not say for certain that Mr. Sutton had ever touched her breast (PH, Pg. 14 – He "[j]ust got really close"; and, PH, Pg. 46 – ML could not recall which breast had been touched). Mr. Fields scheduled an appointment with a counselor in Tulsa (TR, Pg. 437)

F. *Sue Warwick* – At the time of preliminary hearing, ML identified Ms. Warwick as a counselor named "Sue Johnson" (See, i.e., PH, Pg. 38, 45 and 65). ML went to see Ms. Warwick at the recommendation of Mr. Fields, because ML was confused (TR, Pg.

440). ML and Ms. Warwick had one session together, which occurred on February 24 2006 and lasted about an hour (PH, Pg. 38; TR, Pg. 799 and, TR, Pg. 442). ML testified that she told Ms. Warwick only that Mr. Sutton had put his finger into her vagina (TR, Pg. 442). ML denied ever telling anyone that she had sexual intercourse with Mr. Sutton (TR, Pg. 500; See Also, PH, Pg. 59 – Mr. Sutton never attempted sexual intercourse). Ms. Warwick testified that ML had claimed to have had sexual intercourse with Mr. Sutton (TR, Pg. 800).

G. *Jodie Hunt and Martha Kross Vinson* – Both Ms. Hunt and Ms. Kross-Vinson are employed through the Department of Human Services ("DHS"). Ms. Warwick contacted DHS on February 28 2007. Ms. Hunt met with ML on March 2 2007, 6 days after ML met with Ms. Warwick (TR, Pg. 630). Ms. Hunt specifically asked ML if she had intercourse with Mr. Sutton at that time and ML denied having had intercourse with Mr. Sutton (TR, Pg. 669).

H. *Missy Mathews* – Missy Mathews was ML's best friend during the time of the alleged incidents. They confided in one another on "most things", but ML said nothing to Ms. Mathews about any of the alleged incidents (PH, Pg. 44).

At the close of trial, Mr. Sutton requested jury instructions concerning the age of consent. Mr. Sutton asked the Court to include the age of consent as a part of the elements identified within OUJI CR-4-39. Mr. Sutton also asked the Court to include OUJI CR-4-138, the "Consent of Minor" instruction. Each of these requests were overruled (TR, Pg. 944-946; See Also, App. 133 and App. 134). During deliberations, the jury requested instructions on the age of consent. Mr. Sutton urged that the same be given. The Court provided no further instructions (TR, Pg. 995-996; See Also, App. 136 and App. 137).

Under the promise of ML and her father being interested in Mr. Sutton receiving counseling, Mr. Sutton was coerced into providing a confession to investigating officers (TR, Pg. 736). Mr. Sutton's confession does not coincide with the allegations of ML.

Mr. Lemmings told the jury that he "did not think he was going to pursue" taking custody of ML's younger siblings from Mrs. Sutton (TR, Pg. 939). The jury's verdict was announced on February 12 2007. On February 22 2007, Mr. Lemmings sought custody of ML's younger siblings by filing his Motion to Modify in the District Court of Mayes County, State of Oklahoma, *Lemmings v Lemmings*, Case No. FD-01-121.

With due regard for any moral observations one might make of the conduct Mr. Sutton is alleged to have committed, Oklahoma statutes do not

identify the alleged conduct as being criminal. In the alternative, the statutes at issue violate Mr. Sutton's rights of due process inasmuch as they deprive him of his constitutionally guaranteed rights of due process and of the right to be informed of the nature and cause of action against him. As such, Mr. Sutton's conviction should be reversed and this matter dismissed from any further filings.

Concise Argument and Authority

A. The Definition of Child Sexual Abuse as Applied to the Instant Proceeding

To understand the definition of child sexual abuse in Oklahoma, numerous statutes and case authorities must be consulted:

- Tit. 10 OS (2002) § 7115(E) provides that "child sexual abuse" is "...the willful or malicious sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another."

- Tit. 10 OS (2005) § 7102(B)(6) states that, "'[s]exual abuse' includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, *as defined by law*, by a person responsible for the child's health, safety or welfare." (emphasis added)

- In relevant part, Tit. 10 OS (2005) § 7102(B)(5) provides that a "[p]erson responsible for the child's health, safety or welfare includes a parent; a legal guardian; custodian; a foster parent; a person eighteen (18) years of age or older with whom the child's parent cohabitates *or any other adult residing in the home of the child...*" (emphasis added)

Within the second bullet point above, under Tit. 10 OS (2005) § 7102(B)(6), the phrase "as defined by law" provides that other, unidentified laws must be interjected into the definition of the term "sexual abuse". That is to say that the crime of sexual abuse cannot be understood and indeed, cannot exist, unless and until the other, unidentified law is incorporated into the definition of "sexual abuse".

Presumably, the unidentified law is contained within our Oklahoma statutes, case authorities and our common law. Each of these authorities either provide a young person with the right to consent to sexual relations once she is beyond the age of sixteen (16) years or are inapplicable to the facts of this proceeding:

Rape:

Under the alleged circumstances of this case, rape upon *a child* is "an act of sexual

intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator...where the victim is *under sixteen (16) years of age*" (Tit. 21 OS (2001) § 1111(A)(1)[4] (emphasis added).

This crime appears to be a portion of the "unidentified law" upon which the State relies to base its claim of "sexual abuse". (The State's Information alleges that Mr. Sutton "engage[ed] in child sexual abuse of ML, age 17 years old at the time, by intentionally fondling the breasts of ML in a lewd and lascivious manner with his hands and by inserting his finger into the vagina of ML, age 17 years old.") Prosecutrix was beyond the age of 16 years at the time of the alleged incidents and consented to the acts alleged. As such, it cannot be said that Mr. Sutton's conduct has been defined by law to be criminal.

Incest:

Incest, as defined by law, includes those who are related by blood to one another in the first or second degree and who "intermarry with each other, or commit adultery or fornication with each other" (Tit. 21 OS (1999) § 885[5]. No

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[4] Tit. 21 OS (2001) § 1111 – App. 167
[5] Tit 21 OS (1999) § 885 – App. 153

age limitation is referenced. However, "[t]he elements of incest include sexual intercourse." *Hale v State*, 1995 OK CR 7, 888 P.2d 1027, at ¶6.

Prosecutrix denied having any sexual intercourse with Petitioner and as such, the crime of incest cannot be the underlying law to define sexual abuse in this proceeding.

Lewd or Indecent Acts or Proposals – as Defined by Law:

Tit. 21 OS (2003) § 1123[6] is entitled – *Lewd or Indecent Proposals or Acts as to child under 16* (emphasis added). Tit. 21 OS (2003) § 1123(A)(4) makes it a criminal act for any person to "...lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any indecent manner or in any manner relating to sexual matters or sexual interest." Lewd or indecent acts or proposals are defined by law, in fact *limited by law*, to be those lewd or indecent acts or proposals made to a minor child under the age of 16.

This crime appears to be a portion of the "unidentified law" upon which the State relies to base its claim of "sexual abuse". (The State's Information alleges that Mr. Sutton

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[6] Tit 21 OS (2003) § 1123 – App. 172

"engage[ed] in child sexual abuse of ML, age 17 years old at the time, by intentionally fondling the breasts of ML in a lewd and lascivious manner with his hands and by inserting his finger into the vagina of ML, age 17 years old.") But, as defined by law, this crime cannot occur unless the victim is under the age of 16. The age of the victim is an essential element of the crime – in fact, the age is one of the criteria used by the law to define the crime (see, i.e., *Riley v State*, 1997 OK CR APP 51, at ¶ 14-15).

Adultery:

Tit 21 OS (1910) § 871[7] defines adultery as "[t]he unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife as the case may be, or by the husband or wife of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery."

Prosecutrix denied having any sexual intercourse with Petitioner and as such, the

[7] Tit. 21 OS § 871 – App. 152

crime of adultery cannot be the underlying law to define sexual abuse in this proceeding.

Crime Against Nature.

Tit. 21 OS (2002) § 886[8] states in relevant part:

> [a]ny person convicted of a second violation of this section, where the victim of the second offense is a person under sixteen (16) years of age...Any person convicted of a third or subsequent violation of this section, where the victim of the third or subsequent offense is a person under sixteen (16) years of age...

There were no allegations or information concerning the "crime against nature" during the entirety of these proceedings. However, if there had been, this statute makes an issue concerning the age of sixteen (16) years.

Sodomy

Tit. 21 OS (2002) § 888(B)[9] provides a young person with the right to consent to sexual relations once they have have attained the age of sixteen years.

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[8] Tit. 21 OS § 886 – App. 154

[9] Tit. 21 OS (2002) § 888 – App. 156

There were no allegations or information concerning the crime of sodomy during the entirety of these proceedings. However, if there had been, this statute allows for persons who are beyond the age of sixteen (16) years to consent.

Maliciously, Forcibly or Fraudulently Taking or Enticing Away Children

Tit. 21 OS (2000) § 891[10] provides, "[w]hoever maliciously, forcibly or fraudulently takes or entices away any child under the age of twelve (12) years, with intent to detain and conceal such child from its parent, guardian or other person having the lawful charge of such child shall be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year, or by a fine not exceeding Five Hundred Dollars ($500.00), or by both such fine and imprisonment."

Tit. 21 OS § 891[11] was amended in 2007 and again in 2008[12] and in its present state, provides:

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[10] Tit. 21 OS (2000) § 891 – App 161
[11] Tit 21 OS (2007) § 891 - App. 161
[12] Tit. 21 OS (2008) § 891 – App. 161

> Whoever maliciously, forcibly or fraudulently takes or entices away any child under the age of sixteen (16) years...and the offense involved sexual abuse or sexual exploitation, shall be required to serve a term of post-imprisonment supervision pursuant to subparagraph f of paragraph 1 of subsection A of Section 991a of Title 22 ...

There were no allegations or information concerning the crime of "Maliciously, Forcibly or Fraudulently Taking or Enticing Away Children" during the entirety of these proceedings. However, it is noteworthy that the current version of this statute limits its application to children beneath the age of sixteen (16) years, even if the offense involved "sexual abuse".

Common Law:

By English Common Law, it was determined that a child was capable of consenting to sexual relations at the age of 10[13]. By

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[13] Shockingly, by common law the age of consent is said to have originally been *10 years of age* – See, e.g., *United States v. Ransom*, 942 F.2d 775, 777 (10th Cir. 1991), citing to 4 Blackstone Comm. *212. (citing 3 Edw.I Westm. 1. ch. 13), notes that "Blackstone indicated that by the year 1275 the law in England prohibited 'carnally knowing and abusing any woman child under the age of ten years; in which case the

> statutory mandate, the age of consent has been *explicitly* raised to 16 years (See, i.e., Tit. 21 OS § 1111; Tit. 21 OS § 1123(A)(B); and, Tit. 21 OS § 888). As a result of these mandates, traditional and current Oklahoma Common Law hold that a young person beyond the age of 16 years is capable of providing consent to sexual relations (See, e.g., *Fannin v State*, 1939 OK CR 20, 65 Okl.Cr. 444, 88 P.2d 671; and, *Kimbro v State,* 1990 OK CR 4, 857 P.2d 798)

Each of these laws, which are presumably the "unidentified law" referenced within Tit. 10 OS (2005) § 7102(B)(6), clearly provide that the age of consent for sexual relations is sixteen (16) years of age. More importantly, not any one of these laws provides anything to the contrary, either explicitly or even implicitly. Just as important, these laws are incorporated within the definition of sexual abuse as the "unidentified laws" that define "sexual abuse" and as such, no crime has been proven.

B. The Findings of the Oklahoma Court of Criminal Appeals Violate the Principle upon which the Ex Post Facto Clause is based.

The Oklahoma Court of Criminal Appeals sustained Mr. Sutton's conviction because It believes that the language of Tit. 10 OS (2002) § 7115 "clearly

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consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.'"

modifies the age of consent...to 18 years of age when the crime is committed by someone responsible for the child's health, safety or welfare." It is respectfully submitted that the basis for this belief is the result of an improper statutory construction and an improper abrogation of the common law. In implementing Its belief, the Oklahoma Court of Criminal Appeals violated the principle upon which our Ex Post Facto Clause is based. Mr. Sutton's conviction should be set aside and this matter dismissed from further proceedings.

No matter how statutes are constructed by the Courts, there is one "cardinal canon" that must be looked to before all others – statutory interpretation starts with a presumption that the legislature "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v Germain*, 503 US 249, 254 (1992) 112 S.Ct. 1146, 1149.[14] If the law is plain and "...within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v US*, 242 US 470, 485.[15] The statutes at issue are plain

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[14] *Connecticut Nat. Bank v Germain*, 503 US 249, 254 (1992) 112 S.Ct. 1146, 1149[14], citing to *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U. S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810).

[15] *Caminetti v US*, 242 US 470, 485, citing to Lake *County v. Rollins*, 130 U.S. 662, 670, 671 S., 32 L. ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651; Bate *Refrigerating Co. v. Sulzberger, 157 U.S.* 1, 33, 39 S. L. ed. 601, 610, 15 Sup. Ct. Rep. 508; *United States v. Lexington Mill & Elevator Co.* 232 U.S. 399, 409, 58 S.

and require enforcement, but not the erroneous interpretation of the Oklahoma Court of Criminal Appeals.

Neither Tit. 10 OS (2005) § 7102 nor Tit. 10 OS (2002) § 7115 explicitly state that the age of consent has been raised from 16 years of age to 18 years of age (See, Tit. 10 OS § 7115 and 7102). In fact, the reverse is true. Tit. 10 OS § 7102 (B)(6) specifically affirm a young person's right to consent to sexual relations at 16 years of age by explicitly incorporating the other unidentified law.

Tit 10 OS § 7102 (B)(6) provides that "'sexual abuse' includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law, by a person responsible for the child's health, safety or welfare." By relying upon other law to complete the definition of "sexual abuse", the plain language of 7102(B)(6) and the authorities incorporated therein, provides that the age of consent is 16 years of age under the facts and allegations of this proceeding (See, e.g., *Fannin v State*, 1939 OK CR 20, 65 Okl.Cr. 444, 88 P.2d 671; *Kimbro v State*, 1990 OK CR 4, 857 P.2d 798; and, inter alia, Tit. 21 OS (2003) § 1123). To find otherwise is to assume that the Legislature is ignorant of our common law and the laws it has previously passed. Such an assumption is not allowed under the clear provisions of the cardinal canon of statutory construction (See,

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L. ed. 658, 661, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337; *United States v. First Nat. Bank*, 234 U.S. 245, 258, 58 S. L. ed. 1298, 1303, 34 Sup. Ct. Rep. 846

e.g., *Connecticut* and *Caminetti*, supra.) Furthermore, such an assumption cannot be supported as to our common law because the legislature has specifically adopted the common law under two separate statutes.[16]

Mr. Sutton's jury was aware of the common law age of consent and after hearing the testimony of M.L., asked the Court for an instruction concerning the same (TR, pg. 996; and, See Also, Defendant's Requested Jury Instruction, TR, Pg. 945-946). There is nothing explicitly contained within the provisions of Tit. 10 OS § 7102 or § 7115 that denies a young person her right to consent, nor a Defendant the right to present a defense based upon such consent. On the contrary, by incorporating the common law age of consent as a part of the other unidentified laws, the provisions of 7102(B)(6) actually confirm a young person's right to consent and a Defendant's right to present the defense of consent[17].

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[16] See, Tit. 22 OS § 9 – "The procedure, practice and pleadings in the courts of record of this state, in criminal actions or in matters of criminal nature, not specifically provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law."; and, Tit. 12 OS § 2 – "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object."

[17] A defendant is entitled to present affirmative defenses. (See, i.e., *Bosin v State*, 1977 OK CR 195, at ¶17-18, 565 P.2d 1061, wherein it is held that a Defendant "is entitled to an instruction on his theory of defense, provided there is evidence to support

The common law cannot be altered unless it is altered in such a way that is clear, express and explicit. (See, e.g., Hughes v State, 1994 OK CR 3, at ¶ 4, which holds that common laws that are not altered or abolished remain in effect pursuant to 22 O.S. 1981 § 9; See Also, Tit. 22 OS § 9[18]; Tit. 12 OS § 2[19]; and, See Also, Tate v Browning-Ferris, Inc., 1992 OK 72, at ¶ 11, 833 P.2d 1218, which provides:

> By statutory mandate the common law remains in full force in this state, unless a statute explicitly provides to the contrary. Okla. Stat. tit. 12, § 2 (1991). Oklahoma law does not permit legislative abrogation of the common law by implication; rather, its alteration must be clearly and plainly

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it"; *See Also,* i.e., *Gann v State*, 1964 OK CR 122, ¶14, 397 P.2d 686, citing to *Finley v. State*, 84 Okl.Cr. 309, 181 P.2d 849 – "A party is entitled to have the jury instructed on the law governing the issues according to his theory, providing such theory is tenable as a matter of law, or finds possible support in evidence." See Also, *Gann*, Supra, ¶15, citing to Johnson v. State, 84 Okl.Cr. 368, 182 P.2d 777; and the more recent case of Bell v. State, Okl.Cr., 381 P.2d 167 – "A defendant is entitled to an instruction covering his theory of defense, even though under the facts it may appear ridiculous...")

[18] Please See FN9, above.

[19] Please see FN9, above for the provisions of Tit. 12 OS § 2. In addition, although Tit. 12 OS § 2 "is the second paragraph under the heading of 'Civil Procedure' it has been held applicable to criminal as well as civil law." *Elliott v Mills*, 1959 OK CR 22, at ¶ 27, 335 P.2d 1104, citing to *Ex parte McNaught*, 1 Okl.Cr. 260, 100 P. 27; *State v. Smith*, Okl.Cr., 320 P.2d 719; *Spivey v. State*, 69 Okl.Cr. 397, 104 P.2d 263.

> expressed. An intent to change the common law will not be presumed from an ambiguous, doubtful or inconclusive text. *A presumption favors the preservation of common-law rights.*" (emphasis added)

Neither Tit. 10 OS § 7115 nor § 7102 can be determined to have abrogated the legal age of consent. To do so would be to permit the Legislature to abrogate the common law by implication, which is not allowed. Neither Tit. 10 OS § 7102 nor § 7115 explicitly identify a different age of consent. In fact, the reverse is true. Tit. 10 OS § 7102 actually relies upon "the law" to define sexual abuse. Each of the laws that are relevant to this proceeding has defined the age of consent for sexual relations as being sixteen (16) years of age.

Petitioner is not arguing that the common law age of consent cannot be altered, either by the legislature or by way of judicial decree. The argument is that if the legal age of consent is to be abrogated within the context of this proceeding, such abrogation must be prospectively applied to avoid a violation of the principle on which the Ex Post Fact Clause of our Constitution is based.

In *Hughes v State*, 1994 OK CR 3, the common law defense of "born alive" was abrogated. Central to the decision for abandoning this defense was the manner in which medical and scientific technology had advanced (Id, at ¶10). Citing to Tit. 12 OS § 2, the *Hughes* Court, at ¶14 recognized Its "right and

duty to develop the common law of Oklahoma to serve the evolving needs of our citizens." Having decided to abandon the common law defense of "born alive", the *Hughes* Court deliberated whether Its decision would be applied retroactively or prospectively.

Citing to *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984), the *Hughes* Court, at ¶19, noted that *Cass* based Its decision to abandon the "born alive" defense prospectively because "(1) its decision may have been unforeseeable; (2) the possibility of increased punishment for a particular act may have been unforeseeable and could raise constitutional questions; and (3) a prospective-only decision would ensure 'impartiality and regularity in decision-making.'" (emphasis added). Fundamentally, the *Hughes* Court, at ¶20 (citing to *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954), determined that the change in common law would be applied prospectively because:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed..

With respect to judicial interpretation of a criminal statute, the Court has further held that:

> an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' . . . The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred' . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.

citing to Bouie v. Columbia, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 1702-03, 12 L.Ed.2d 894 (1964) (emphasis added) (citations omitted).

The *Hughes* Court recognized, at ¶21, that the abandonment of a common law defense must be prospective in order to provide Defendant with "fair warning that her conduct would result in a criminal charge." To do otherwise, would be to violate the principle on which the Ex Post Facto Clause is based, Id., at ¶21; See Also, USCS Const. Art. I, § 10, Cl 1 – "No State shall...pass any...ex post facto Law..."; Okl. Const. Art. II, § 15 – "No...ex post facto law...shall ever be passed")

Our common law age of consent has a long-standing history, which has been modified from time to time by statute. It can be assumed that the modifications are based on advancements in the psychological community; advancements in the medical community such that individuals are now living longer and can therefore take the time to mature at a more deliberate pace; and, other such advancements. It may be time to elevate the age of consent. But, it cannot reasonably be said that such a rise is foreseeable before the Court has taken such a step. Even Mr. Sutton's jury presumed that 16 years is still the age of consent (TR, pg. 996; and, See Also, Defendant's Requested Jury Instruction, TR, Pg. 945-946). In order to give Mr. Sutton and the citizens of Oklahoma fair warning, any change in the age of consent must be applied prospectively. Until then, Mr. Sutton's conviction should be overturned and the charges against him dismissed.

C. In the Alternative, Tit. 10 OS § 7102 and 7115 are Void for Vagueness

"It is fundamental that statutes creating criminal offenses must be drawn in language sufficient to apprise the public of exactly what conduct is forbidden. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *State v Saunders*, 1994 OK CR 76, at ¶6, 886 P.2d 496, citing to *Hayes v. Municipal Court of Oklahoma City*, 487 P.2d 974, 976 (Okl.Cr. 1971). In *State ex rel. Coats v Rakestraw*, 1980 OK CR 24, 610 P.2d 256, it was held that:

> [t]he applicable rule is stated in Connally v. General Constr. Co. 269 U.S. 385, 391, [70 L. Ed. 322, 46 S. Ct. 126]: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (Citations omitted, footnote omitted)

From the State's Information, it is clear that the instant charges arise out of a stepparent allegedly engaging in a sexual relationship with a stepdaughter, who was beyond the age of consent at the time of the relationship. The Information does not allege that the relationship was non-consensual. As such, it must be presumed to be consensual. This presumption is borne out by testimony of the Prosecutrix.

No matter how outrageous the alleged conduct of your Petitioner, the public has by no means been apprised that such a relationship is criminal in nature. There is nothing informative about a statute that speaks of a child being beneath the age of 18, which then goes on to refer to other, unidentified laws to "define" that which is supposed to constitute child sexual abuse. This is true especially when the only other laws that could possibly act as a continuation of the first, all provide for consensual relationships once a child is beyond the age of 16 years. There is no doubt that even men of *extraordinary* intelligence must necessarily guess at the meaning of the first statute. This confusion is clearly apparent within Jury Question No.2 (TR, Pg. 995-996; See Also, OR 152-153).

Furthermore, "[a] strict construction is to be applied to criminal statutes and courts should not extend them to embrace acts or conduct *not clearly* included within the prohibition of the statute. [A] [p]erson cannot be convicted of a crime *unless* the act which is committed is within both *letter* and spirit of

penal statute." *Matthes v Powers*, 1967 OK CR 37, at ¶8, 425 P.2d 479 (emphasis added). Simply put, a statute which seeks to charge one with a criminal offense cannot be "enlarged by implication or intendment beyond the fair meaning of the language used, or what their terms reasonably justify, and will not be held to include offenses and persons other than those which are clearly described and provided for, although the court in interpreting and applying particular statutes may think the legislature should have made them more comprehensive." *Id., at* ¶9 (emphasis added).

Child sexual abuse cannot be interpreted through the provisions of Tit. 10 OS § 7102 and 7115 to include the acts alleged by the State. Neither 7102, nor 7115 define sexual abuse to include a consensual relationship that includes a consenting individual who is beyond the age of consent. Instead, 7102 refers ambiguously to "the" law for a definition of sexual abuse (viz., "as defined by law"). That referral points to other, unidentified laws, all of which define child sexual abuse to be an act(s) committed upon a person who has not yet attained the age of consent[20]. There is no Oklahoma law that defines child sexual abuse to include a consensual relationship involving an individual who is beyond

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[20] As noted above, the crime of *Lewd or Indecent Proposals or Acts* is, by statute, expressly defined to include only those individuals who are "under 16" – beneath the age of consent. In addition, each of the authorities that define the crime of sexual under the facts of this proceeding provide that the age of consent is sixteen (16) years.

the age of consent, at least not one that would constitute a crime under the facts and circumstances as alleged by the State. To so hold, would constitute an enlargement beyond the fair meaning of the language used within Tit. 10 OS § 7102 and 7115.

As the statute stands now, 7115 provides that "[C]hild sexual abuse' means the willful or malicious sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another." Five additional words at the end of the previous sentence would allow for 7115 to clearly define by law that the facts presently at issue constitute a crime, viz., "either with or without consent". Our legislature knows the common law age of consent is set at 16 years of age and has enacted other legislation that specifically deprives a child of her right to consent[21]. Should the Legislature desire to abrogate the age of consent, it certainly has that authority, but for whatever reason has thus far decided against such a change.

Our common law age of consent, if not applicable to the provisions of Tit. 10 OS § 7102 and 7115, is then in direct conflict with 7102 and 7115. A plain understanding of our common law provides that a person is capable of giving consent once the individual attains the age of 16. Our common law

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[21] (see, i.e., Tit. 21 OS (2000) § 1021.3, which identifies a child as being beneath the age of 18 years and provides that the "consent of the minor to the activity prohibited by this section shall not constitute a defense."

"may not be abrogated by mere implication [and will] undergo alteration (or abrogation) *solely when the intent to do so is clearly and plainly expressed.* An ambiguous legislative text is insufficient as a basis for the common law's abrogation." *McCathern v. City of Okla. City*, 2004 OK 61, 95 P.3d 1090 (emphasis added; See Also, Tit. 22 OS § 9).

Having a statute that defines child sexual abuse "by law" – without any reference whatsoever as to the law that is doing the defining – is the quintessential expression of ambiguity. The ambiguity grows when the law that must be referenced continues to define the age of consent as being sixteen (16) years of age.[22] It cannot be reasonably held that the legislative text of Tit. 10 OS § 7102 and 7115 are sufficient as a basis for the abrogation of the common and statutory law age of consent in Oklahoma. As such, and in light of there being no allegation nor evidence that the relationship complained of was anything other than consensual, it further cannot be held that the crime of child sexual abuse occurred under the facts alleged by the State. Mr. Sutton's conviction should be reversed and this matter dismissed from any further proceedings.

D. Conclusion:

Mr. Sutton stands before this Court of last resort as a fifty-one year old citizen, who prior to the

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[22] See, e.g., the common law; Tit. 21 OS § 1111; and, Tit. 21 OS § 1123.

incident alleged had not so much as a speeding citation. He is a father of two grown children. Mr. Sutton had maintained the same employment for over twenty years prior to this incident. He served his community for nearly as many years as a volunteer fireman.

Mr. Sutton also stands before this Court a convicted felon, who is now obligated to register as a sex offender for the remainder of his life. Mr. Sutton served six months in the county jail for the acts alleged and will continue to pay the fines and costs associated with this proceeding for some time to come. Both he and his wife have endured not only these proceedings, but the custody proceedings that were initiated while the ink from the jury's verdict was still drying. He has forfeited his retirement and savings on the legal fees and court costs associated with this proceeding. He has paid and will continue forever to pay for the acts alleged within the context of this proceeding, even if his conviction is overturned.

It is respectfully submitted that Mr. Sutton's Petition for Certiorari should be granted as a matter of law.

Respectfully submitted,
JOHN KENNETH SUTTON, Petitioner

By: _____
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Appendix

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IN THE DISTRICT COURT IN AND FOR MAYES COUNTY, STATE OF OKLAHOMA.

INFORMATION

STATE OF OKLAHOMA,	)Child Sexual Abuse
	)10-7115
Plaintiff,	)
	)[Filed Mar 22 2006]
vs.	)
	)
JOHN KENNETH SUTTON,	)
dob: 5/14/57 SS#	)
Defendant.	) CF-2006-85
	)

That Gene Haynes, the duly qualified and acting District Attorney for Mayes County, Oklahoma, who prosecutes in the name and by the authority of the STATE Of OKLAHOMA, comes now into the District Court of Mayes County, State of Oklahoma, and gives the Court to understand and be informed that:

JOHN KENNETH SUTTON,

Between August, 2004, and May 2005, in Mayes County, Oklahoma, JOHN KENNETH SUTTON, committed the crime of CHILD SEXUAL ABUSE, a felony, in violation of 10 O.S. Supp. 2002, Section 7115, by willfully engaging in child sexual abuse of M.L., age 17 years old at the time by intentionally fondling the breasts of M.L. in a lewd and lascivious manner with his hands and by

inserting his finger into the vagina of M.L., age 17 years old, when the said defendant was over the age of Eighteen (18) years and responsible for the welfare of M.L.,

contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State.

GENE HAYNES,
DISTRICT ATTORNEY

BY:_____
Assistant District Attorney

Subscribed and sworn to before me this 20th day of March, 2006.

My Commission #05016382
Expires: 04/15/08

_____
NOTARY PUBLIC

WITNESSES:
M.L.
Steve Lemmings, PPD, Pryor, OK
Jodie Hunt, Rogers Co. DHS, Claremore, OK
Martha Kross Vinson, CAC, Claremore, OK
Sue Warwick, Crossroad Private Practice
Chris Fields, Faith Baptist Church
Eddie Griffin, DA Investigator, Pryor,OK

NOTICE OF AVAILABILITY OF INVESTIGATIVE REPORTS

COMES NOW, the State of Oklahoma and hereby gives Notice to the Defendant and his counsel that pursuant to 22 O.S. Section 258, all law enforcement reports in the possession of the District Attorney are immediately available for inspection in the Office of the District Attorney during normal business hours.

Notice is hereby given that the Defendant and /or his Attorney of Record may examine these reports by contacting the Office of the District Attorney and requesting an appointment. Copies of these reports are available for the sum of 25 cents per page.

IN THE DISTRICT COURT IN AND FOR MAYES COUNTY, STATE OF OKLAHOMA.

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
-v-	)	Case No. CF-06-85
	)	[Filed Feb 2 2007]
JOHN SUTTON,	)	
	)	
Defendant.	)	

DEMURRER TO THE INFORMATION AND MOTION TO DISMISS, WITH BRIEF IN SUPPORT

COMES NOW the Defendant, JOHN SUTTON, and for his Demurrer to the Information and Motion to Dismiss, with Brief in Support, he states and alleges to the Court as follows, to wit:

1. On March 22 2006, the State filed Its Information against Defendant, John Sutton, charging him with child sexual abuse, a felony in violation of Tit. 10 OS § 7115. The instant charges are based upon allegations that Mr. Sutton:

> [W]illfully engage[ed] in child sexual abuse of M.L., age 17 years old at the time, by intentionally fondling the breasts of M.L. in a lewd and lascivious manner with his hands and by inserting

his finger into the vagina of M.L., age 17 years old, when the said Defendant was over the age of eighteen (18) years and responsible for the welfare of M.L.

2. Nothing contained within the above allegations has been defined by law, whether statute, common law or otherwise, to be a crime. In fact, and much to the contrary, our State statutes and our common law dictate that the above acts – even if true – ***do NOT*** constitute a crime.

3. Defendant's demurrer should be granted and the charges against him dismissed.

BRIEF IN SUPPORT

A. Brief Introductory Remarks and Statement of Facts

This case is about a set of alleged facts that have not yet been **defined by law** to constitute a crime. Defendant, John Sutton, stands before the Court accused of having sexually abused a seventeen (17) year old child, M.L. It is alleged that Mr. Sutton sexually abused M.L. "by intentionally fondling the breasts of M.L. in a lewd and lascivious manner with his hands and by inserting his finger into the vagina of M.L., age 17 years old, when the said Defendant was over the age of eighteen (18) years and responsible for the welfare of M.L." Mr. Sutton is the stepfather of M.L.

To prove that the crime of sexual abuse has occurred and that the Defendant committed the crime as charged, the State must demonstrate the following[1]:

1. A person responsible for the child's health or safety welfare;
2. Willfully/maliciously;
3. Engaged in;
4. Sexual abuse. Sexual abuse includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law, by a person responsible for the child's health, safety or welfare (Tit. 10 OS § 7102(B)(6);
5. Of a child under the age of eighteen.

Assuming that the State's evidence will prove each of the facts alleged within Its Information, the State is able to demonstrate the second, third and fifth elements. But, under no circumstances can the State prove the first or the fourth elements. As such, no crime has been committed and this matter should be dismissed.

This Motion will demonstrate first that the crime of child sexual abuse under Tit. 10 OS § 7115 has not been **defined by law** to include consensual relationships involving young adults, who are above the age of consent. As such, the State cannot, under the facts of this case *as alleged by the State and* as demonstrated at the time of the preliminary hearing,

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[1] Per OUJI-CR-4-39 (See Also Tit. 10 § 7115)

meet the burden required of It through the fourth element. Second, this Motion will demonstrate that as defined by law, the Defendant is not a *person responsible for the child's health, safety or welfare.* As such, the State cannot, under the facts of this case *as alleged by the State*, meet the burden required of It through the first element.

B. Argument and Authority

PROPOSITION I: THE CRIME OF CHILD SEXUAL ABUSE UNDER TIT. 10 OS § 7115 HAS NOT BEEN DEFINED BY LAW TO INCLUDE CONSENSUAL RELATIONSHIPS INVOLVING YOUNG ADULTS ABOVE THE AGE OF CONSENT, BUT BENEATH THE AGE OF MAJORITY.

Tit. 10 OS § 7115 has not defined the crime of child sexual abuse to include consensual relationships involving young adults who are above the age of consent, but beneath the age of 18. Per Tit. 10 OS § 7115, "'[C]hild sexual abuse' means the willful or malicious sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this title, of **a child under eighteen (18) years** of age by another." Tit. 10 OS § 7102(B)(6) provides that, "'*sexual abuse*' includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, **as defined by law**, by a person responsible

for the child's health, safety or welfare." (emphasis added)

Tit. 10 OS § 7102(B)(6) is nebulous – and can be read at least a couple of different ways, with two very different results. "**Sexual abuse includes**, but is not limited to, **rape, incest and lewd or indecent acts or proposals made to a child**, **as defined by law**, by a person responsible for the child's health, safety or welfare"

If read in favor of the State, 7102 would be read in such a way that the phrase "**as defined by law**" is attendant to only the word "**child**". In other words, the State assumes that it is the word "**child**" that is to be "**defined by law**".

But, when read *properly*, 7102 provides that sexual abuse is an act, which "**includes,** but is not limited to**, rape, incest and lewd or indecent acts or proposals made to a child**" as those acts are "**defined by law**". It is the acts of "**rape, incest and lewd or indecent acts or proposals**" that are to be "**defined by law**". The acts of "rape, incest and lewd or indecent acts or proposals", **as defined by law** and applied to the assumed facts of this matter, demonstrate that no crime has been committed:

Rape – as Defined by Law:

Rape, upon *a child*, **as defined by law**, is "an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or

female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator...where the victim is **under sixteen (16) years of age**" (Tit. 21 OS § 1111(A)(1) (emphasis added). Stated more precisely, **rape** *upon a child*, **as defined by law**, is an act...where the victim is **under sixteen (16) years of age**.

Rape in the first degree is **defined by law** as a "[r]ape committed by a person over eighteen (18) years of age upon a person **under fourteen (14) years of age**"

Incest – as Defined by Law:

Incest, as defined by law, includes those who are related by blood to one another in the first or second degree and who "intermarry with each other, or commit adultery or fornication with each other" (Tit. 21 OS § 885). No age limitation is referenced.

Lewd or Indecent Acts or Proposals – as Defined by Law:

Tit. 21 OS 1123 is entitled – *Lewd or Indecent Proposals or Acts* ***as to child under 16*** (emphasis added). This statute provides that the act of making a "**lewd or indecent act or proposal**" is a felony in the event that the same is perpetrated against a "child" under the age of 16 years. **Lewd or indecent acts or proposals** are **defined by law**, in fact

limited by law, to be those lewd or indecent acts or proposals made to a **minor child under the age of 16**.

This crime cannot occur **unless** the victim is **under the age of 16**. The age of the victim is an essential element of the crime – in fact, the age is one of the criteria used by the **law** to **define** the crime (see, i.e., *Riley v State*, 1997 OK CR APP 51, at ¶ 15).

Age of Consent – as Defined by Law:

The age of consent has been **defined by our common law** through statutory interpretations, to be **16 years of age**. (See, i.e., *Fannin v State*, 65 Okl.Cr. 444, 88 P.2d 671 (Okla. Cr. 1939); and, *Kimbro v State, 1990 OK CR 4*, 857 P.2d 798)

The State's charge is that the Defendant committed child sexual abuse "by intentionally fondling the breasts of M.L. **in a lewd and lascivious manner** with his hands and by inserting his finger into the vagina of M.L., age 17 years old". The State's charge is premised upon a violation of Tit. 21 OS § 1123. But, in light of the statutory requirement that the victim be **under the age of 16 years,** no crime has occurred. Even if the State's charge is not premised upon a violation of Tit. 21 OS § 1123, it still cannot be demonstrated that a crime has occured. There is no crime of sexual abuse that has been **defined by law** to include the acts alleged within the State's Information.

Our **common law**, provides that a person is capable of giving consent at the age of **16 years**. The Prosecutrix was 17 years of age at all times relevant to this proceeding, as disclosed within the State's Information. Unless otherwise specifically provided, the common law prevails (See Tit. 12 OS § 2; See Also, Hughes v. State, 1994 OK CR 3, at ¶4, which holds that common laws are not altered or abolished remian in effect pursuant to 22 O.S. 1981 § 9; and, See also, Tit. 22 OS § 9 - "The procedure, practice and pleadings in the courts of record of this state, in criminal actions or in matters of criminal nature, not specifically provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law.").

The State's Information does not allege facts or information that have been **defined by law** to constitute a crime. The State's Information does not allege a non-consensual encounter. As such, no crime has been alleged, the Defendant's Motion should be granted and this matter dismissed.

PROPOSITION II: IN LIGHT OF CONLFLICTING STATUTES, THE DEFENDANT CANNOT CLEARLY BE IDENTIFIED AS A PERSON RESPONSIBLE FOR THE WELFARE OF M.L.

The first element the State must prove is that the Defendant is a person "responsible for the welfare" of M.L. This requirement arises out of the provisions of Tit. 10 OS § 7102(B)(5) (sexual abuse occurs through the acts of a "'**[p]erson responsible for a child's health, safety or welfare' includes a** parent; a legal guardian; a custodian; a foster parent; **a person eighteen (18) years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child**..."). This requirement is conflicted by the terms of Tit. 10 OS § 15, which provides that a "**husband is not bound to maintain his wife's children by a former husband**; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and where such is the case, **they are not liable to him for their support, nor he to them for their services**"

Mr. Sutton is a **person eighteen (18) years of age or older with whom M.L.'s parent cohabitated**. Mr. Sutton is also an **adult that resided within the home of M.L. at the time of the alleged acts**. But, Mr. Sutton, **as the husband** of M.L.'s mother, is **not bound to maintain M.L.** Mr. Sutton's status as being a **person responsible for the welfare of M.L.** is not clearly identifiable because of these conflicting statutes.

PROPOSITION III: THE STATUTES UPON WHICH THE STATE'S INFORMATION ARE PREMISED ARE EITHER INAPPLICABLE TO THE

FACTS ALLEGED OR, IN THE ALTERNATIVE, ARE VOID FOR VAGUENESS.

"**It is fundamental** that **statutes creating criminal offenses must** be drawn in language sufficient to **apprise the public of exactly what conduct is forbidden. A statute** which either forbids or requires the doing of an act in terms **so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.**" *State v Saunders*, 1994 OK CR 76, at ¶6, citing to *Hayes v. Municipal Court of Oklahoma City*, 487 P.2d 974, 976 (Okl.Cr. 1971) (emphasis added). (See Also, *State ex rel. Coats v Rakestraw*, 1980 OK CR 24, where in it was held that "[t]he applicable rule is stated in Connally v. General Constr. Co. 269 U.S. 385, 391, [70 L. Ed. 322, 46 S. Ct. 126]: 'That **the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties**, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" (Citations omitted, footnote omitted, emphasis added)

From the State's Information, it is clear that the instant charges arise out of a stepparent allegedly engaging in a sexual relationship with a stepdaughter, who was beyond the age of consent at the time of the relationship. The Information does not allege that the relationship was non-consensual[2]. As such, it must be presumed to be consensual. No matter how outrageous the alleged conduct may appear, the public has by no manner **been apprised that such a relationship is criminal in nature**. There is nothing informative about a statute that speaks of a child being beneath the age of 18, which then goes on to refer to other, unidentified laws to "define" that which is supposed to constitute child sexual abuse. This is true especially when the only other statutes that could possibly act as a continuation of the first, all provide for consensual relationships once a child is beyond the age of 16 years. Even if the **common law age of consent** is not added to this already confusing hodgepodge of authorities, there is no doubt that even **men of *extraordinary* intelligence must necessarily guess at the meaning of the first statute.**

Furthermore, "[a] strict construction is to be applied to criminal statutes and **courts should not extend them to embrace acts or conduct *not clearly* included within the prohibition of the statute**. Person cannot be convicted of a crime *unless* the act which is committed is within both ***letter*** and spirit of penal statute." *Matthes v Powers*, 1967 OK CR 37 (emphasis added). Simply put, a

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[2] Please see footnote 2, above.

statute which seeks to charge one with a criminal offense **cannot be "enlarged by implication or intendment beyond the fair meaning of the language used**, or what their terms reasonably justify, **and will not be held to include offenses and persons other than those which are clearly described** and provided for, although the court in interpreting and applying particular statutes may think the legislature should have made them more comprehensive." *Id* (emphasis added).

Child sexual abuse **cannot be** interpreted through the provisions of Tit. 10 OS § 7102 and 7115 **to include the acts alleged by the State**. Neither 7102, nor 7115 **define** sexual abuse to include a consensual relationship that includes an individual who is beyond the **age of consent**. Instead, 7102 refers ambiguously to "the" law for a definition of sexual abuse (viz., "as defined by law"). That referral points to other, unidentified laws, all of which **define** child sexual abuse to be an act(s) committed upon a person who has not yet attained the **age of consent**[3]. There is no Oklahoma **law that defines** child sexual abuse to include a consensual relationship involving an individual who is beyond the **age of consent**, at least not one that would constitute a crime under the facts and circumstances as alleged by the State. To so hold, would constitute **an enlargement beyond the fair meaning of the language used within Tit. 10 OS § 7102 and 7115**. The legislature needs to provide more

[3] As noted above, the crime of *Lewd or Indecent Proposals or Acts* is, by statute, expressly defined to include only those individuals who are "under 16" – beneath the age of consent.

comprehensive language if it intends for the crime of child sexual abuse to encompass those instances where the facts are as the State alleges.

As the statute stands now, 7115 provides that "[C]hild sexual abuse' means the willful or malicious sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another." Five additional words at the end of the previous sentence would allow for 7115 to **clearly define by law** that the facts presently at issue constitute a crime, viz., "either with or without consent". But, then again, maybe the Legislature left the definition of child sexual abuse upon a child beneath the age of 18 to be **defined by an unidentified law** purposefully. Perhaps it was the intent of the Legislature to allow for consensual relationships. Our legislature knows the **common law age of consent** is set at 16 years of age. In fact, the age of consent being 16 years has been codified under both Tit. 21 OS § 1111 and 1123. Had the Legislature desired to abrogate the age of consent, it could have so done, but chose not to, for whatever reason.

Our **common law age of consent**, if not applicable to the provisions of Tit. 10 OS § 7102 and 7115, is then in direct conflict with 7102 and 7115. A plain understanding of our common law provides that a person is capable of giving consent once the individual attains the age of 16. Our **common law** "may not be abrogated by mere implication [and will] undergo alteration (or abrogation) *solely when the intent to do so is clearly and plainly expressed.* **An**

ambiguous legislative text is insufficient as a basis for the common law's abrogation." *McCathern v. City of Okla. City*, 2004 OK 61 (emphasis added; See Also, Tit. 22 OS § 9).

Having a statute that defines child sexual abuse "**by law**" – without any reference whatsoever as to the law that is doing the defining – is the quintessential expression of **ambiguity**. The ambiguity grows when **our common law** defines the age of consent as being age 16 and this **definition** continues to be present within other statutory law.[4] It cannot be reasonably held that the **legislative text of Tit. 10 OS § 7102 and 7115 are sufficient as a basis for the abrogation of the common and statutory law age of consent in Oklahoma**. As such, and in light of there being no allegation that the relationship complained was non-consensual, it further cannot be held that the crime of child sexual abuse occurred under the facts alleged by the State.

C. Conclusion

Regardless of any moral observations one can make as to the conduct alleged within the State's Information, it is clear that such conduct has not clearly defined by law to constitute a crime. If the legislature would prefer that the conduct described by the State be deemed a crime, that is certainly Its prerogative, but that conduct must be **defined clearly by law** to constitute a crime. To do

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[4] viz. Tit. 21 OS § 1111; and, Tit. 21 OS § 1123

otherwise is to violate the "first essential of due process of law."

The charges against Defendant should be dismissed and his bond exonerated.

Respectfully submitted,
JOHN KENNETH SUTTON, Defendant

By: _____
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CERTIFICATE OF MAILING

I, CHRISTOPHER B. LYONS, do hereby certify that on the 2nd day of February 2007, I mailed a true and correct copy of the within and foregoing pleading to Mr. Charles A. Ramsey and Ms. Rebecca Gore, Mayes County District Courthouse, with proper postage thereon, fully prepaid.

_____
CHRISTOPHER B. LYONS

IN THE DISTRICT COURT IN AND FOR MAYES COUNTY, STATE OF OKLAHOMA.

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
-v-	)	Case No. CF-06-85
	)	
JOHN SUTTON,	)	
	)	
Defendant.	)	

AMENDED DEMURRER TO THE INFORMATION AND MOTION TO DISMISS, WITH BRIEF IN SUPPORT

COMES NOW the Defendant, JOHN SUTTON, and for his Amended Demurrer to the Information and Motion to Dismiss, with Brief in Support, he submits the following Amended Demurrer as an amendment and supplement to his Original Demurrer. Defendant states and alleges to the Court as follows, to wit:

1. On March 22 2006, the State filed Its Information against Defendant, John Sutton, charging him with child sexual abuse, a felony in violation of Tit. 10 OS § 7115. The instant charges are based upon allegations that Mr. Sutton:

> [W]illfully engage[ed] in child sexual abuse of M.L., age 17 years old at the

time, by intentionally fondling the breasts of M.L. in a lewd and lascivious manner with his hands and by inserting his finger into the vagina of M.L., age 17 years old, when the said Defendant was over the age of eighteen (18) years and responsible for the welfare of M.L.

2. Nothing contained within the above allegations has been defined by law, whether statute, common law or otherwise, to be a crime. In fact, and much to the contrary, our State statutes and our common law dictate that the above acts – even if true – ***do NOT*** constitute a crime.

3. Defendant's demurrer should be granted and the charges against him dismissed.

BRIEF IN SUPPORT

A. Brief Introductory Remarks and Statement of Facts

This case is about a set of alleged facts that have not yet been **defined by law** to constitute a crime. Defendant, John Sutton, stands before the Court accused of having sexually abused a seventeen (17) year old child, M.L. It is alleged that Mr. Sutton sexually abused M.L. "by intentionally fondling the breasts of M.L. in a lewd and lascivious manner with his hands and by inserting his finger into the vagina of M.L., age 17 years old, when the said Defendant was over the age of eighteen (18) years and

responsible for the welfare of M.L." Mr. Sutton is the stepfather of M.L.

To prove that the crime of sexual abuse has occurred and that the Defendant committed the crime as charged, the State must demonstrate the following[1]:

1. A person responsible for the child's health or safety welfare;
2. Willfully/maliciously;
3. Engaged in;
4. Sexual abuse. Sexual abuse includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law, by a person responsible for the child's health, safety or welfare (Tit. 10 OS § 7102(B)(6);
5. Of a child under the age of eighteen.

Assuming that the State's evidence will prove each of the facts alleged within Its Information, the State is able to demonstrate the second, third and fifth elements. But, under no circumstances can the State prove the first or the fourth elements. As such, no crime has been committed and this matter should be dismissed.

This Motion will demonstrate first that the crime of child sexual abuse under Tit. 10 OS § 7115 has not been **defined by law** to include consensual relationships involving young adults, who are above

[1] Per OUJI-CR-4-39 (See Also Tit. 10 § 7115)

the age of consent. As such, the State cannot, under the facts of this case *as alleged by the State and* as demonstrated at the time of the preliminary hearing, meet the burden required of It through the fourth element. Second, this Motion will demonstrate that as defined by law, the Defendant is not a *person responsible for the child's health, safety or welfare.* As such, the State cannot, under the facts of this case *as alleged by the State,* meet the burden required of It through the first element.

B. Argument and Authority

PROPOSITION I: THE CRIME OF CHILD SEXUAL ABUSE UNDER TIT. 10 OS § 7115 HAS NOT BEEN DEFINED BY LAW TO INCLUDE CONSENSUAL RELATIONSHIPS INVOLVING YOUNG ADULTS ABOVE THE AGE OF CONSENT, BUT BENEATH THE AGE OF MAJORITY.

Tit. 10 OS § 7115 has not defined the crime of child sexual abuse to include consensual relationships involving young adults who are above the age of consent, but beneath the age of 18. Per Tit. 10 OS § 7115, "'[C]hild sexual abuse' means the willful or malicious sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this

title, of **a child under eighteen (18) years** of age by another." Tit. 10 OS § 7102(B)(6) provides that, "'*sexual abuse*' includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, **as defined by law**, by a person responsible for the child's health, safety or welfare." (emphasis added)

Tit. 10 OS § 7102(B)(6) is nebulous – and can be read at least a couple of different ways, with two very different results. "**Sexual abuse includes**, but is not limited to, **rape, incest and lewd or indecent acts or proposals made to a child**, **as defined by law**, by a person responsible for the child's health, safety or welfare"

If read in favor of the State, 7102 would be read in such a way that the phrase "**as defined by law**" is attendant to only the word "**child**". In other words, the State assumes that it is the word "**child**" that is to be "**defined by law**".

But, when read *properly*, 7102 provides that sexual abuse is an act, which "**includes,** but is not limited to, **rape, incest and lewd or indecent acts or proposals made to a child**" as those acts are "**defined by law**". It is the acts of "**rape, incest and lewd or indecent acts or proposals**" that are to be "**defined by law**". The acts of "rape, incest and lewd or indecent acts or proposals", **as defined by law** and applied to the assumed facts of this matter, demonstrate that no crime has been committed:

Rape – as Defined by Law:

Rape, upon *a child*, **as defined by law**, is "an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator...where the victim is **under sixteen (16) years of age**" (Tit. 21 OS § 1111(A)(1) (emphasis added). Stated more precisely, **rape** *upon a child*, **as defined by law**, is an act...where the victim is **under sixteen (16) years of age**. If the individual is above the **age of consent**, then rape can occur only when the perpetrator relies upon force or violence to overcome the victim's resistance (Tit. 21 OS § 1111(A)(3).

Rape in the first degree is **defined by law** as a "[r]ape committed by a person over eighteen (18) years of age upon a person **under fourteen (14) years of age**"

Incest – as Defined by Law:

Incest, as defined by law, includes those who are related by blood to one another in the first or second degree and who "intermarry with each other, or commit adultery or fornication with each other" (Tit. 21 OS § 885). No age limitation is referenced.

Lewd or Indecent Acts or Proposals – as Defined by Law:

Tit. 21 OS 1123 is entitled – *Lewd or Indecent Proposals or Acts* ***as to child under 16*** (emphasis added). This statute provides that the act of making a "**lewd or indecent act or proposal**" is a felony in the event that the same is perpetrated against a "child" under the age of 16 years. **Lewd or indecent acts or proposals are defined by law**, in fact ***limited by law***, to be those lewd or indecent acts or proposals made to a **minor child under the age of 16**.

This crime cannot occur **unless** the victim is **under the age of 16**. The age of the victim is an essential element of the crime – in fact, the age is one of the criteria used by the **law** to **define** the crime (see, i.e., *Riley v State*, 1997 OK CR APP 51, at ¶ 15).

Age of Consent – as Defined by Law:

The age of consent has been **defined by our common law** through statutory interpretations, to be **16 years of age**. (See, i.e., *Fannin v State*, 65 Okl.Cr. 444, 88 P.2d 671 (Okla. Cr. 1939); and, *Kimbro v State, 1990 OK CR 4,* 857 P.2d 798)

The State's charge is that the Defendant committed child sexual abuse "by intentionally fondling the breasts of M.L. **in a lewd and lascivious manner** with his hands and by inserting his finger into the vagina of M.L., age 17 years old".

The State's charge is premised upon a violation of Tit. 21 OS § 1123. But, in light of the statutory requirement that the victim be **under the age of 16 year,** no crime has occurred. If the State's charge is not premised upon a violation of Tit. 21 OS § 1123, then it must be premised upon a violation of Tit. 21 OS § 1111. But, the State has alleged no force, no violence, or any threat to overcome the resistance of the Prosecutrix[2]. It cannot be demonstrated that a crime has occurred. There is no crime of sexual abuse that has been **defined by law** to include the acts alleged within the State's Information.

Our **common law**[3], which has been codified, provides that a person is capable of giving consent at

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[2] If the relationship complained of was non-consensual, then the Information on Its face is invalid for failure to inform the Defendant of each and every material fact upon which the State brings the present charges. (See, e.g., Tit. 22 OS § 401(2) "A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended"; See Also, "It is an elementary principle in criminal jurisprudence that every material fact essential to the commission of a criminal offense must be alleged in the indictment or information. There can be no conviction or punishment for a crime without a formal and sufficient accusation. In the absence thereof the court acquires no jurisdiction whatever, and if it assumes jurisdiction, the trial and conviction are a nullity." *Prestage v State*, 1959 OK CR 3, at ¶3; 348 P.2d 865

[3] Unless otherwise specifically provided, the common law prevails (See Tit. 12 OS § 2; See Also, *Hughes v State*, 1994 OK CR 3, at ¶ 4, which holds that common laws that are not altered or abolished remain in effect pursuant to 22 O.S. 1981 § 9; and, See Also, Tit. 22 OS § 9 – "The procedure, practice and pleadings in the courts of record of this state, in criminal actions or in matters of criminal nature, not specifically

the age of **16 years**. The Prosecutrix was 17 years of age at all times relevant to this proceeding, as disclosed within the State's Information. The State's Information and the testimony of the Prosecutrix at the time of the Preliminary Hearing, which is incorporated herein by reference, demonstrate that the acts complained of were all consensual.

The State's Information does not allege facts or information that have been **defined by law** to constitute a crime. The State's Information does not allege a non-consensual encounter. As such, no crime has been alleged, the Defendant's Motion should be granted and this matter dismissed.

PROPOSITION II: IN LIGHT OF CONLFLICTING STATUTES, THE DEFENDANT CANNOT CLEARLY BE IDENTIFIED AS A PERSON RESPONSIBLE FOR THE WELFARE OF M.L.

The first element the State must prove is that the Defendant is a person "responsible for the welfare" of M.L. This requirement arises out of the provisions of Tit. 10 OS § 7102(B)(5) (sexual abuse occurs through the acts of a "'**[p]erson responsible for a child's health, safety or welfare' includes a**

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provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law.").

parent; a legal guardian; a custodian; a foster parent; a **person eighteen (18) years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child**..."). This requirement is conflicted by the terms of Tit. 10 OS § 15, which provides that a "**husband is not bound to maintain his wife's children by a former husband**; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and where such is the case, **they are not liable to him for their support, nor he to them for their services**"

Mr. Sutton is a **person eighteen (18) years of age or older with whom M.L.'s parent cohabitated**. Mr. Sutton is also an **adult that resided within the home of M.L. at the time of the alleged acts**. But, Mr. Sutton, **as the husband** of M.L.'s mother, is **not bound to maintain M.L.** Mr. Sutton's status as being a **person responsible for the welfare of M.L.** is not clearly identifiable because of these conflicting statutes.

PROPOSITION III: THE STATUTES UPON WHICH THE STATE'S INFORMATION ARE PREMISED ARE EITHER INAPPLICABLE TO THE FACTS ALLEGED OR, IN THE ALTERNATIVE, ARE VOID FOR VAGUENESS.

The charges against Defendant are pursued either from a misinterpretation of Tit. 10 OS § 7102 and 7115 or, § 7102 and § 7115 are void for vagueness. The misinterpretation ignores the common law age of consent. It assumes that because M.L. was a "child under 18 years", she has no right of consent under the facts alleged and in light of § 7115. However, neither § 7102 nor § 7115 deprive Prosecutrix of her right to consent. In fact, the opposite is true. These statutes reaffirm a Prosecutrix's right to consent. In the alternative, the vague wording of these statutes, if applied to the facts of this case in such a way to determine that a crime has been committed, are void because of their vagueness.

"**It is fundamental that statutes creating criminal offenses must** be drawn in language sufficient to **apprise the public of exactly what conduct is forbidden. A statute** which either forbids or requires the doing of an act in terms **so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.**" *State v Saunders*, 1994 OK CR 76, at ¶6, citing to *Hayes v. Municipal Court of Oklahoma City*, 487 P.2d 974, 976 (Okl.Cr. 1971) (emphasis added). (See Also, *State ex rel. Coats v Rakestraw*, 1980 OK CR 24, where in it was held that "[t]he applicable rule is stated in Connally v. General Constr. Co. 269 U.S. 385, 391, [70 L. Ed. 322, 46 S. Ct. 126]: 'That **the terms of a penal statute creating a new offense must be**

sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" (Citations omitted, footnote omitted, emphasis added)

From the State's Information, it is clear that the instant charges arise out of a stepparent allegedly engaging in a sexual relationship with a stepdaughter, who was beyond the age of consent at the time of the relationship. The Information does not allege that the relationship was non-consensual[4]. As such, it must be presumed to be consensual. No matter how outrageous the alleged conduct may appear, the public has by no manner **been apprised that such a relationship is criminal in nature.** There is nothing informative about a statute that speaks of a child being beneath the age of 18, which then goes on to refer to other, unidentified laws to "define" that which is supposed to constitute child sexual abuse. This is true especially when the only other statutes that could possibly act as a continuation of the first, all provide for consensual relationships once a child is beyond the age of 16 years. Even if the **common law age of consent** is not added to this already confusing hodgepodge of

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[4] Please see footnote 2, above.

authorities, there is no doubt that even **men of *extraordinary* intelligence must necessarily guess at the meaning of the first statute.**

Furthermore, "[a] strict construction is to be applied to criminal statutes and **courts should not extend them to embrace acts or conduct *not clearly* included within the prohibition of the statute**. Person cannot be convicted of a crime *unless* the act which is committed is within both ***letter*** and spirit of penal statute." *Matthes v Powers*, 1967 OK CR 37 (emphasis added). Simply put, a statute which seeks to charge one with a criminal offense **cannot be "enlarged by implication or intendment beyond the fair meaning of the language used**, or what their terms reasonably justify, **and will not be held to include offenses and persons other than those which are clearly described** and provided for, although the court in interpreting and applying particular statutes may think the legislature should have made them more comprehensive." *Id* (emphasis added).

Child sexual abuse **cannot be** interpreted through the provisions of Tit. 10 OS § 7102 and 7115 **to include the acts alleged by the State**. Neither 7102, nor 7115 **define** sexual abuse to include a consensual relationship that includes an individual who is beyond the **age of consent**. Instead, 7102 refers ambiguously to "the" law for a definition of sexual abuse (viz., "as defined by law"). That referral points to other, unidentified laws, all of which **define** child sexual abuse to be an act(s) committed upon a person who has not yet attained the **age of**

consent[5]. There is no Oklahoma **law that defines** child sexual abuse to include a consensual relationship involving an individual who is beyond the **age of consent,** at least not one that would constitute a crime under the facts and circumstances as alleged by the State. To so hold, would constitute **an enlargement beyond the fair meaning of the language used within Tit. 10 OS § 7102 and 7115.** The legislature needs to provide more comprehensive language if it intends for the crime of child sexual abuse to encompass those instances where the facts are as the State alleges.

As the statute stands now, 7115 provides that "[C]hild sexual abuse' means the willful or malicious sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another." Five additional words at the end of the previous sentence would allow for 7115 to **clearly define by law** that the facts presently at issue constitute a crime, viz., "either with or without consent". But, then again, maybe the Legislature left the definition of child sexual abuse upon a child beneath the age of 18 to be **defined by an unidentified law** purposefully. Perhaps it was the intent of the Legislature to allow for consensual relationships. Our legislature knows the **common law age of consent** is set at 16 years of age. In fact, the age of consent being 16 years has been codified under both Tit. 21 OS § 1111 and 1123.

---

[5] As noted above, the crime of *Lewd or Indecent Proposals or Acts* is, by statute, expressly defined to include only those individuals who are "under 16" – beneath the age of consent.

Had the Legislature desired to abrogate the age of consent, it could have so done, but chose not to, for whatever reason.

Our **common law age of consent**, if not applicable to the provisions of Tit. 10 OS § 7102 and 7115, is then in direct conflict with 7102 and 7115. A plain understanding of our common law provides that a person is capable of giving consent once the individual attains the age of 16. Our **common law** "may not be abrogated by mere implication [and will] undergo alteration (or abrogation) *solely when the intent to do so is clearly and plainly expressed.* **An ambiguous legislative text is insufficient as a basis for the common law's abrogation.**" *McCathern v. City of Okla. City*, 2004 OK 61 (emphasis added; See Also, Tit. 22 OS § 9).

Having a statute that defines child sexual abuse "**by law**" – without any reference whatsoever as to the law that is doing the defining – is the quintessential expression of **ambiguity**. The ambiguity grows when **our common law** defines the age of consent as being age 16 and this **definition** continues to be present within other statutory law.[6] It cannot be reasonably held that the **legislative text of Tit. 10 OS § 7102 and 7115 are sufficient as a basis for the abrogation of the common and statutory law age of consent in Oklahoma**. As such, and in light of there being no allegation that the relationship complained was non-consensual, it

[6] viz. Tit. 21 OS § 1111; and, Tit. 21 OS § 1123

further cannot be held that the crime of child sexual abuse occurred under the facts alleged by the State.

C. Conclusion

Regardless of any moral observations one can make as to the conduct alleged within the State's Information, it is clear that such conduct has not been clearly defined by law to constitute a crime. If the legislature would prefer that the conduct described by the State be deemed a crime, that is certainly Its prerogative, but that conduct must be **defined clearly by law** to constitute a crime. To do otherwise is to violate the "first essential of due process of law."

The charges against Defendant should be dismissed and his bond exonerated.

Respectfully submitted,
JOHN KENNETH SUTTON, Defendant

By: _____
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of LYONS LAW FIRM,
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CERTIFICATE OF MAILING

I, CHRISTOPHER B. LYONS, do hereby certify that on the ___ day of February 2007, I mailed a true and correct copy of the within and foregoing pleading to Mr. Charles A. Ramsey and Ms. Rebecca Gore, Mayes County District Courthouse, with proper postage thereon, fully prepaid.

_____

CHRISTOPHER B. LYONS

IN THE DISTRICT COURT IN AND FOR MAYES COUNTY, STATE OF OKLAHOMA.

STATE OF OKLAHOMA, [Filed Feb 5 2007]

Plaintiff,

vs.

JOHN KENNETH SUTTON,
dob: 5/14/57 SS#

Defendant. CF-26-85

STATE'S OBJECTION TO THE DEFENDANT'S DEMURRER TO THE INFORMATION AND MOTION TO DISMISS AND BRIEF IN SUPPORT

COMES NOW the State of Oklahoma and requests this Court to deny the defendant's Demurrer to the Information and Motion to Dismiss and in support alleges and states as follows:

That the defendant is charges with the crime of Sexual Child Abuse in violation of Title 10 O.S. Supp. 2002 § 7115 by willfully engaging in child sexual abuse of M.L. by intentionally fondling her breasts in a lewd and lascivious manner and by inserting his finger into her vagina at the time with the defendant was over the age of eighteen and a person responsible for M.L.'s welfare. The defendant argues the State has failed to allege any crime given that the child in this instance was seventeen at the time of the acts.

Title 10 O.S. Supp. 2002 § 7115, the statute under which Mr. Sutton is charged clearly prohibits a person responsible for the child's welfare from willfully or maliciously engaging in child sexual abuse as defined in Title 10 O.S. Supp. 2002 § 7102. Sexual abuse, in 10 O.S. Supp. 2002 § 7102, is defined as inculding, but not limited to, rape, incest, and lewd or indecent acts or proposals made to a child, as defined by law, by a person responsible for child's welfare.

Oklahoma's law further provides that a person responsible for a child's welfare, as defined in that same statue, includes a person eighteen years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child. In this instance Mr. Sutton, while being over the age of eighteenm resided in the child's home and lived with the child's mother during the time of these incidents. as such, he clearly falls within the statutory definition of a person responsible for M.L.'s welfare, contrary to the defendant's argument.

The next step is whether the acts alleged are prohibited. While the defendant properly defines rape and lewd or indecent acts with children under the age of sixteen, he fails to address the elements of Mr. Sutton's charged crime of Child Sexual Abuse. Had Mr. Suttons' acts fallen under either Rape or Lewd Molestation, the State would have simply charged him under these two statutes. Rather his actions fall under the Child Sexual Abuse. The elements of that crime as listed in OUJI-CR 4-30 include a child under the age of eighteen. Had the

State Legislature intended to limit the age of the child to sixteen, there would be no need to have this separate and distinct crime.

The defendant concedes that a child over the age of sixteen could be a victim of rape or sexual battery if there is no force, violence or threat to overcome the victim's resistance. However, the charged crime in the case at bar requires no such element if force. See Huskey v. State, 989 P.2d 1 (Okla. Crim. 1999). In Huskey, the defendants were charged with Child Sexual Abuse stemming from acts that the court could only determine as being closely related to lewd and indecent acts with a child. The trial court therefore instructed the jury that the state must prove (1) willful or malicious; (2) causing, procuring or permitting; (3) lewd or indecent acts; (4) upon a child under age of eighteen; and (5) by a person responsible for a child's welfare. Id. at 5. The trial court further instructed the jury that to satisfy (3), the State must prove EITHER (1) the defendant looked upon, touched or felt, (2) the body or private parts of the child (3) in any lewd or lascivious manner, OR (1) a child under sixteen years of age (2) to look upon the private parts of another person or sexual acts performed in the child's preformed in the child's presence (3) for the purpose of sexual gratification, (4) in a lewd and lascivious manner. Id.

On appeal the defendant argued that the trial court did not include all of the elements for Lewd Molestation, specifically the element of "forcing or requiring" a child to look upon others' private parts. The Court of Criminal Appeals noted that the

defendants had not be convicted of Lewd Molestation, but rather Sexual Child Abuse and as such Sexual Child Abuse did not require "force" as it punished those who engaged, caused, procured or permitted child abuse as otherwise defined. Huskey at 5. The Court opined that "we will not presume the Legislature to have done a vain thing" Id. at 6. The Court continued, by saying:

> No matter what the underlying particular allegation of sexual abuse, the crime as defined in Section 7115 has no: force or require" element. The defendant need only have caused or procured the abuse in question. Without this distinction, the amendments to Section 7115 appear pointless: if the State must allege and prove the elements of lewd and indecent conduct in order to convict a parent of child abuse under Section 7115, why not simply require it to charge the crime under Section 1123? The legislature evidently intended Section 7115, child abuse, to be a separate crime encompassing activity already prohibited by other statues. This is apparent from the lack of any element of force, no matter what the underlying activity, and the imposition of a separate punishment which may be greater than that imposed by statute on any individual form of sexual abuse or exploitation. While a court may not change the elements of any given crime, certainly the Legislature may do so.

Id. at 6. As such, the State Legislature must have intended to protect children under the age of eighteen from acts constituting rape, such as the insertion of a finger into the child's vagina, and acts constituting rape, such as fondling the child's breasts, by a person living in the home even though such acts committed by others might not be deemed a crime unless the victim is under sixteen or unless the act was done with force. To rule otherwise would be to presume that the Legislature enacted Child Sexual Abuse in vain.

The defendant further fails to properly address the crime of Incest. He argues that such a crime can only be committed by those related by blood. However, the elements of incest as listed in OUJI-CR 4-137 are (1) (married to)/(committed adultery/fornication with); (2) the defendant's (relative---for the degrees of consanguinity that are incestuous as a matter of law see 43 O.S. 1991 § 2). Those relationships include stepfather and stepdaughter. See 43 O.S. 2001 § 2.

CONCLUSION

The Oklahoma Legislature intended to extend the age of child victims suffering from sexual abuse at the hands of those responsible for their welfare to eighteen. As such, Mr. Sutton's actions in inserting his finger into M.L.'s vagina and touching her breasts in a lewd and lascivious manner constitute a crime although she was seventeen the time.

WHEREFORE, premises considered, the State of Oklahoma prays that the defendants Demurrer to the Information and Motion to Dismiss be denied.

State of Oklahoma, Plaintiff

Rebecca J. Gore, OBA #16225
Assistant District Attorney

CERTIFICATE OF DELIVERY

I, Rebecca J. Gore, do hereby certify that on the 5th day of February, 2007, I hand delivered a true and correct copy of the above response to:

Christopher B. Lyons
Attorney for Defendant
419 W Patti Page Boulevard
Claremore, OK 74017
Fax: (918)342-5774

Rebecca J. Gore

IN THE DISTRICT COURT IN AND FOR MAYES COUNTY, STATE OF OKLAHOMA.

STATE OF OKLAHOMA,	)
	)
Plaintiff,	)
	)
-v-	)Case No. CF-06-85
	) [Filed Feb 5 2007]
JOHN SUTTON,	)
	)
Defendant.	)

ORDER OVERRULING DEFENDANT'S DEMURRERAND ORDER GRANTING STAY OF PROCEEDINGS

NOW on this 5th day of February 2007, this matter comes on for hearing upon Defendant's Motion for Demurrer. Plaintiff, STATE OF OKLAHOMA, is present in person and with Its attorney, REBECCA J. GORE, of the Mayes County District Attorney's Office. Defendant, JOHN SUTTON is present in person and with his attorney, CHRISTOPHER B. LYONS, of LYONS LAW FIRM, CHRISTOPHER B. LYONS & ASSOCIATES, PC.

The Court, having examined the files and records in this case, having fully considered the evidence, and being fully advised in the premises, FINDS:

1. That Defendant's Demurrer be and the same is hereby overruled in all of its particulars; Defendant's exceptions having been dually noted.

2. That Defendant should be and he is hereby granted a stay from these proceedings until February 7 2007 at 9:30 a.m. for purposes of appealing the Court's ruling, at which time Defendant shall appear and advise the Court accordingly.

IT IS THEREFORE ORDERED, ADJUDGED, DECREED AND DECLARED by the Court that Defendant's Demurrer be and the same is hereby overruled. Exceptions of the Defendant noted.

IT IS FURTHER ORDERED, ADJUDGED, DECREED AND DECLARED by the Court that this matter shall be and is hereby stayed until February 7 2007 at 9:30 a.m., at which time Defendant is to appear and advise the Court accordingly. The Court will then determine the course of these proceedings.

IT IS SO ORDERED.

_____

HONORABLE TERRY H. MCBRIDE,
JUDGE OF THE DISTRICT COURT

IN THE DISTRICT COURT IN AND FOR MAYES COUNTY, STATE OF OKLAHOMA.

STATE OF OKLAHOMA
Plaintiff(s)

GENE HAYNES
Attorney(s) for Plaintiff(s)

--vs-- Case No. CF-2006-00085
[Filed Feb 12 2007]

JOHN KENNETH SUTTON
Defendant(s)

CHRISTOPHER B. LYONS
Attorney(s) for Defendant(s)

COURT MINUTE

02/12/2007 CM - LLP - MCBRIDE. CR LARIMER. STATE PRESENT BY ADA REBECCA GORE. DEFENDANT PRESENT BY ATTORNEY CHRISTOPHER B. LYONS. JURY RETURNS VERDICT. DEFENTDANT FOUND GUILTY. PUNISHMENT AFFIXED AT 6 MONTHS IN MAYES COUNTY JAIL AND A FINE OF $3,000.00. COURT ORDERS PRESENTENCE INVESTIGATION. FORMAL SENTENCING SET FOR FRIDAY MARCH 30, 2007 AT 9:30 A.M.

DEFENDANT REMANDED TO THE CUSTODY OF THE MAYES COUNTY SHERIFF.

MINUTE BY: _____

_____

JUDGE

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA.

JOHN KENNETH SUTTON,	) Appeal Case No.
	) F-2007-351
Appellant,	) (Felony)
	) [Filed: Aug 27 2007]
-v-	) Appeal From:
	) District Court of
STATE OF OKLAHOMA,	) Mayes
	) County, Oklahoma,
Appellee	) Case No. CF-06-85

APPELLANT'S BRIEF IN CHIEF

Respectfully submitted,
JOHN KENNETH SUTTON, Appellant

By:
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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA.

JOHN KENNETH SUTTON,	)Appeal Case No.
	)F-2007-351
Appellant,	)(Felony)
	) [Filed : Aug 27 2007]
-v-	)Appeal From:
	)District Court of
STATE OF OKLAHOMA,	)Mayes County,
	)Oklahoma,
Appellee	)Case No. CF-06-85

APPELLANT'S BRIEF IN CHIEF

COMES NOW the Appellant, JOHN SUTTON, and for his Brief in Chief, he respectfully submits that the verdict against him should be set aside and the charges against him dismissed.

A. Brief Statement of the Case:

Through a trial by jury, Mr. Sutton has been convicted of felony child sexual abuse, sentenced to 6 months in the county jail and ordered to pay a $3,000.00 fine. Prosecutrix, ML, was seventeen years old and Mr. Sutton's stepdaughter at the time of the supposed incidents. There are no allegations of Mr. Sutton using any force, fear, intimidation or coercion to accomplish the acts alleged. The alleged acts were consensual. Mr. Sutton, who is a lifelong resident of Oklahoma, fifty years of age and who has no prior arrests of any kind, has been wrongfully convicted.

On appeal, Mr. Sutton elects to pursue those arguments concerning surrounding whether the State's charge against Mr. Sutton alleges acts that have been defined by law to constitute a crime. As seen below, it is clear that Mr. Sutton's conviction should be reversed and this matter dismissed from any further prosecution.

B. Course of Proceedings and Disposition at Trial:

1. On March 22 2006, Mr. Sutton was charged with felony child sexual abuse, in violation of Tit. 10 OS § 7115. The charges are based upon allegations that Mr. Sutton:

> [W]illfully engage[ed] in child sexual abuse of ML, age 17 years old at the time, by intentionally fondling the breasts of ML in a lewd and lascivious manner with his hands and by inserting his finger into the vagina of ML, age 17 years old, when the said Defendant was over the age of eighteen (18) years and responsible for the welfare of ML

2. Mr. Sutton filed his Demurrer and Amended Demurrer to the Information on February 2 2007, both of which were denied by the Trial Court on February 5 2007. The Trial Court's ruling assumes that the age of consent for sexual relations has been elevated to 18 years of age in circumstances involving members of the same household. Its assumption is based upon Its beliefs as to the

"intended purposes" and "implied" mandates of Tit. 10 OS § 7102, 7115 and et seq.

3. Trial proceedings were stayed until February 7 2007 in order to allow Mr. Sutton an opportunity to seek a Writ from the Oklahoma Court of Criminal Appeals. Mr. Sutton filed his Application for Suspension of the Ten Day Rule with the Oklahoma Court of Criminal Appeals in order to have his Writ heard. Mr. Sutton's Application was denied and his Writ refused because of the Ten Day Rule. At no time have the merits of Mr. Sutton's arguments been heard by this Court.

4. This matter was tried before a jury on the 7, 8, 9 and 12 days of February 2007. On February 12 2007, the jury found Mr. Sutton guilty of the crime of child sexual abuse and sentenced him to 6 months in the Mayes County Jail. Mr. Sutton was also fined $3,000.00.

5. Mr. Sutton is a lifelong resident of Oklahoma. He has two grown children. He has maintained the same employment for over twenty-two years. He has been a voluntary firefighter for nearly as many years. He has not had so much as a speeding ticket prior to the offense alleged. Members of the Oklahoma Highway Patrol and Adair Fire Department testified as character witnesses for Mr. Sutton.

6. Mr. Sutton, although out on bail during the course of these proceedings, was immediately taken into custody once the verdict was pronounced.

The Court granted Mr. Sutton's oral motion for pre-sentence investigation.

7. Formal judgment and sentencing of Mr. Sutton was had on March 30 2007 at 9:30 a.m., at which time Mr. Sutton was formally sentenced to 6 months in the county jail and fined $3,000.00.

8. This matter should be overturned with instructions to dismiss because no crime was alleged within the State's Information inasmuch as the charge is premised upon a misinterpretation of Tit. 10 O.S. § 7102 and 7115. In the alternative, Tit. 10 OS § 7102 and 7115 are void for vagueness. In either event, the Trial Court was without jurisdiction to proceed. The verdict against Mr. Sutton should be reversed and these proceedings dismissed.

C. Statement of Facts Relevant to the Instant Review

ML is a seventeen-year-old stepdaughter of Mr. Sutton at the time of alleged incidents (TR, Pg. 399 and 669). ML is also a senior in high school and an active member of her school's German club, choir and band (TR, Pg. 367). ML carries a 4.0 grade point average at the time of the alleged incidents (TR, Pg. 456). Not one of ML's personal relationships suffered during the time of the alleged incidents (TR, Pg. 456). ML leaves her mother's home – not because of the alleged incidents – but because of a disagreement she was having with her mother (See, i.e., TR, Pg. 422 and 456). In fact, even after ML left her mother's home, she continued to stay in contact with Mr.

Sutton, bringing him cookies and sitting next to him at a family Christmas gathering (TR, Pg. 512; TR, Pg. 783; and, Defendant's Exhibit No. 5).

ML and her family had a nightly routine for going to bed (PH, Pg. 11). It started with ML and her two siblings climbing into ML's bed (See, i.e., PH, Pg. 9). ML, or one of her two younger siblings would then holler out for Mr. or Mrs. Sutton and ask that they tuck them in (See, i.e., TR, Pg. 390 and 466). Mr. and sometimes Mrs. Sutton would then go into ML's room, say goodnight and talk about the day/events in general (PH, Pg. 11-12). Mr. Sutton would also scratch backs if he was asked (PH, Pg. 12). ML always slept on the side of the bed closest to her bedroom door (TR, Pg. 489). ML claims that the alleged incidents happened during this nightly routine.

The First Alleged Incident:

ML claims that she is in her bed with her two siblings[1] present and the family is going through their nightly routine (PH, Pg. 10-13). ML is lying face down on the bed, with her hands at her side when she asks Mr. Sutton to scratch her back (PH, Pg. 13-14). ML claims that while scratching her back, Mr. Sutton "touched the side of [her] boob and touched

---

[1] Both of ML's siblings were present at trial and testified. Both of her siblings testified that they had not seen or heard anything out of the ordinary during the time of the alleged incidents (TR, Pg. 820-833; and, 833-844). BL, is ML's younger sister – she was 10 years old at the time of the alleged incidents. RL is ML's younger brother – he was 11 years old at the time of the alleged incidents.

the inside of [her] thigh" (PH, Pg. 13-14). ML does not remember which of her breasts are touched (PH, Pg. 14). ML does not remember if her breast is touched before or after her thigh is touched (PH, Pg. 15). At trial, ML testified that she believed the breast touching was actually an accident (TR, Pg. 498-499). ML could not say for certain that Mr. Sutton had ever touched her breast; she thought he "[j]ust got really close" (PH, Pg. 14).

At the time of this incident, ML and Mr. Sutton were engaged in a conversation (PH, Pg. 16). ML did not say anything to Mr. Sutton about this alleged incident (PH, Pg. 49). ML did not tell anyone about this alleged incident (PH, Pg. 17).

Alleged Penetration Incidents:

ML claims that after the first incident, Mr. Sutton progressed to placing his finger into her vagina. When asked how many times this occurred, ML says "it wasn't a lot. [b]ut it was more than three or four" (PH, Pg. 58). At trial, ML claims first that it happened "a couple" of times (TR, Pg. 413). Then she said, it happened "more than two or three" times (TR, Pg. 492).

ML claims that each of the alleged penetration incidents happened the same way (PH, Pg. 18-19 and 54; and, TR, Pg. 416 and 472). The alleged incidents always took place at night and only in ML's bedroom (TR, Pg. 416 and PH, Pg. 42). ML's mom is always home, usually in mom's bedroom or the living room (TR, Pg. 417). ML is not sure if her siblings are

awake but they are in her bed (PH, Pg. 54). ML is always laying face down (PH, pg. 26). Her legs are always "slightly apart" or "slightly open" (PH, Pg. 22 and 29; and, TR, Pg. 408 and 472). She is always wearing underwear and shorts/pants (PH, Pg. 52). ML is looking in the direction of Mr. Sutton (See, i.e., PH, Pg. 21). Mr. Sutton is always beside her bed sitting down (PH, Pg. 19 and 25). Mr. Sutton is then supposed to go under ML's clothing and place his finger inside ML's vagina (PH, Pg. 21). Mr. Sutton's finger does not do anything while inside of ML (TR, Pg. 409). While Mr. Sutton's finger is supposedly inside ML, Mr. Sutton and ML are engaged in conversation with one another – talking about school, events of the day, etc. (See, i.e., PH, Pg. 57). ML states that after each of the alleged incidents "if we were talking we would finish what we were talking about, then good-night, I love you, and we would go to bed." (PH, Pg. 57) ML further says that although she was talking with Mr. Sutton at the time of the alleged incidents and she was not afraid of him, she did not tell Mr. Sutton no or to stop (PH, Pg. 57).

ML told a number of people about her alleged rendezvous with Mr. Sutton, including her Father, Steve Lemmings[2]; her stepmother, Tammy Lemmings; her former boyfriend Jake Marlin; her sister, Traci Hager; her boyfriend, Jesse Muhlee; her youth minister, Chris Fields; a counselor, Sue Warwick; DHS representatives; and other Pryor Police Officers. The nature of the information ML

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2. Each of the incidents complained of allegedly took place in Pryor, Oklahoma (See, i.e., TR, Pg. 363).

provides to each person and that person's reaction to the information, is essentially as follows:

A. *Steve Lemmings* – Steve Lemmings is ML's natural father and an investigator with the Pryor Police Department who investigates sexual abuse crimes (TR, Pg. 369-370; and, 480). When ML tells Steve Lemmings of the alleged incident, Tammy Lemmings and ML's boyfriend, Jake, are also present (TR, Pg. 430). ML states that she told Investigator Lemmings the night after she moved out of her mom's house in May 2005 (PH, Pg. 35-36). ML told Investigator Lemmings that "something had happened between me and Johnny that shouldn't have, and it made me really uncomfortable and that's part of the reason why I moved out." (PH, Pg. 63). Investigator Lemmings asked questions of ML for more details, but she refused to provide them (PH, Pg 63). Without knowing any of the details, Investigator Lemmings supposedly wanted ML to contact DHS, and ML's mother to protect ML's sister. ML contacted no one suggested by her father (PH, Pg 62-63; See Also, TR, 431-432). Investigator Lemmings, as a sexual abuse investigator and the father of ML, did nothing other than to suggest to ML that she "needed to tell somebody" (TR, Pg. 432 and 942). Investigator Lemmings also told ML that in deciding whether to "tell somebody" she needed to think of her younger sister,

Bethanie, who was still residing with her mother and the Defendant (Tr., Pg. 432). After this initial conversation in May 2005 with ML, Investigator Lemmings never raised the subject with ML again (Tr., Pg. 433).

B. *Traci Hager* – Traci Hager is ML's sister (TR, Pg. 426). During portions of her testimony, ML claims Traci was the first person she told (TR Pg. 426 and 429-430). During other portions, ML claims that she told Traci second or third (TR, Pg. 463 and 464). Her conversation with Traci was over the phone, from her father's home, almost two weeks after she moved into her father's home (Tr., Pg. 425-426). ML told Traci "[j]ust that something happened between me and Johnny, that shouldn't have" (TR, Pg. 426). ML provided no other details, but felt that Traci should know because they used to be close to one another (TR, Pg. 427). Upon further prodding of the State, ML remembered that she told Traci "something happened" out of concern for Traci's two daughters (TR, Pg. 427).

C. *Jake Marlin* – Jake Marlin is a former boyfriend of ML (TR, Pg. 413-414). ML claims to have told Mr. Marlin around Christmas 2005, sometime after the first alleged incident but before the second alleged incident (TR, Pg. 413). ML claims that she told Mr. Marlin because she "was going to start asking somebody to be home

with [her] after school. That way on the days that he was home, [she] wasn't there with him by [herself]." (PH, Pg. 34) In response to a follow up question, ML stated that not one of the alleged incidents occurred after school (PH, Pg. 35). In response to further questioning, ML claims that Mr. Sutton never did "anything that made [her] feel uncomfortable when [she] would be home alone with him." (PH, Pg. 36). At the time of trial, ML claims to have told Mr. Marlin of the alleged incidents without providing any detail. In response, Mr. Marlin allegedly instructs ML to tell her mom and DHS and ML does neither (TR, Pg. 414-415).

D. *Jesse Muhlee* – Jesse Muhlee is a current boyfriend of ML (TR, Pg. 433). ML testified that she told Mr. Muhlee while she was in a car with him "[j]ust that some stuff had happened." (TR, Pg. 434). ML provided no detail, but was instructed by Mr. Muhlee "to talk with somebody" – to talk with her youth minister, Chris Fields (TR, Pg. 434-435).

E. *Chris Fields* – Chris Fields is ML's youth minister. ML testified at trial that she told Mr. Fields "things happened between me and Johnny that shouldn't have happened", but that she provided no detail (TR, Pg. 436). During cross-examination, ML states that she told Mr. Fields about Mr. Sutton

touching her breast(s) (TR, Pg. 498). Later on, ML explains that she believed the breast touching was actually an accident (TR, Pg. 498-499). In fact, at the time of the preliminary hearing, ML could not say for certain that Mr. Sutton had ever touched her breast (PH, Pg. 14 – He "[j]ust got really close"; and, PH, Pg. 46 – ML could not recall which breast had been touched). Mr. Fields scheduled an appointment with a counselor in Tulsa (TR, Pg. 437)

F. *Sue Warwick* – At the time of preliminary hearing, ML identified Ms. Warwick as a counselor named "Sue Johnson" (See, i.e., PH, Pg. 38, 45 and 65). ML went to see Ms. Warwick at the recommendation of Mr. Fields, because ML was confused (TR, Pg. 440). ML and Ms. Warwick had one session together, which occurred on February 24 2006 and lasted about an hour (PH, Pg. 38; TR, Pg. 799 and, TR, Pg. 442). ML testified that she told Ms. Warwick only that Mr. Sutton had put his finger into her vagina (TR, Pg. 442). ML denied ever telling anyone that she had sexual intercourse with Mr. Sutton (TR, Pg. 500; See Also, PH, Pg. 59 – Mr. Sutton never attempted sexual intercourse). Ms. Warwick testified that ML had claimed to have had sexual intercourse with Mr. Sutton (TR, Pg. 800).

G. *Jodie Hunt and Martha Kross Vinson* – Both Ms. Hunt and Ms. Kross-Vinson are

employed through the Department of Human Services ("DHS"). Ms. Warwick contacted DHS on February 28 2007. Ms. Hunt met with ML on March 2 2007, 6 days after ML met with Ms. Warwick (TR, Pg. 630). Ms. Hunt specifically asked ML if she had intercourse with Mr. Sutton at that time and ML denied having had intercourse with Mr. Sutton (TR, Pg. 669).

H. *Missy Mathews* – Missy Mathews was ML's best friend during the time of the alleged incidents. They confided in one another on "most things", but ML said nothing to Ms. Mathews about any of the alleged incidents (PH, Pg. 44).

At the close of trial, Mr. Sutton requested jury instructions concerning the age of consent. Mr. Sutton asked the Court to include the age of consent as a part of the elements identified within OUJI CR-4-39. Mr. Sutton also asked the Court to include OUJI CR-4-138, the "Consent of Minor" instruction. Each of these requests were overruled (TR, Pg. 944-946; See Also, OR 109-110). During deliberations, the jury requested instructions on the age of consent. Mr. Sutton urged that the same be given. The Court provided no further instructions (TR, Pg. 995-996; See Also, OR 152-153).

Under the promise of ML and her father being interested in Mr. Sutton receiving counseling, Mr. Sutton was coerced into providing a confession to investigating officers (TR, Pg. 736). Mr. Sutton's

confession does not coincide with the allegations of ML (State's Exhibit No. 2 and No. 3).

Mr. Lemmings told the jury that he "did not think he was going to pursue" taking custody of ML's younger siblings from Mrs. Sutton (TR, Pg. 939). The jury's verdict was announced on February 12 2007. On February 22 2007, Mr. Lemmings sought custody of ML's younger siblings by filing his Motion to Modify in the District Court of Mayes County, State of Oklahoma, *Lemmings v Lemmings,* Case No. FD-01-121.

Without regard for whether Mr. Sutton committed the acts complained of, the acts described by ML have simply not been defined by law to constitute a crime. As such, Mr. Sutton's conviction should be reversed and this matter dismissed from any further filings.

D. Argument and Authorities

PROPOSITION I: THE DEFINITION OF THE CRIME OF CHILD SEXUAL ABUSE, AS DEFINED BY LAW.

Child sexual abuse, as **defined by law**, is comprised of several distinct elements. At the outset, the crime of child sexual abuse is **defined by law**[3] as "the willful or malicious sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this

[3] Tit. 10 OS § 7115(E)

title, of **a child under eighteen (18) years** of age by another." 7102[4] provides that, "'*sexual abuse*' **includes**, but is not limited to, **rape, incest and lewd or indecent acts or proposals** made to a child, **as defined by law**, by a person responsible for the child's health, safety or welfare." (emphasis added) A "'**[p]erson responsible for a child's health, safety or welfare' includes a parent**; a legal guardian; a custodian; a foster parent; **a person eighteen (18) years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child...**" (emphasis added)

In order for the State to demonstrate that the crime of child sexual abuse has occurred, the State must demonstrate: 1) A person responsible for the child's health or safety welfare; 2) Willfully/maliciously; 3) Engaged in; 4) Sexual abuse – as **defined by law**; 5) of a child under the age of eighteen. The **law that defines** acts of sexual abuse is not specifically identified. It must be assumed that the phrase "as defined by law" points to other sex crime statutes, e.g., rape; incest; lewd or indecent acts or proposals; other sex crimes defined by law; and, our common law.

Rape – as Defined by Law:

Rape, upon *a child*, **as defined by law**, is "an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or

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[4] Tit. 10 OS § 7102(B)(6)

female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator...where the victim is **under sixteen (16) years of age**" (Tit. 21 OS § 1111(A)(1) (emphasis added). Stated more precisely, **rape** *upon a child*, **as defined by law**, is an act...where the victim is **under sixteen (16) years of age**. If the individual is above the **age of consent**, then rape can occur only when the perpetrator relies upon force or violence to overcome the victim's resistance (Tit. 21 OS § 1111(A)(3).

Rape in the first degree is **defined by law** as a "[r]ape committed by a person over eighteen (18) years of age upon a person **under fourteen (14) years of age**"

Incest – as Defined by Law:

Incest, as defined by law, occurs when persons "within the degrees of consanguinity within which marriages are by the laws of the state declared incestuous and void, intermarry with each other, or commit adultery or fornication with each other" (Tit. 21 OS § 885). No age limitation is referenced. Both "fornication" and "adultery" have been defined as requiring the act of "**sexual intercourse**" [5] between persons (emphasis added).

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[5] Black's Law Dictionary, (8th ed., West, a Thomson business 2004); See Also, *Signs v State*, 1926 OK CR 395, 35 Okl. Cr. 340, 343, 344, 250 P. 938; Tit. 21 OS § 871, "Adultery is the

Lewd or Indecent Acts or Proposals – as Defined by Law:

Tit. 21 OS 1123 is entitled – *Lewd or Indecent Proposals or Acts* ***as to child under 16*** (emphasis added). This statute provides that the act of making a "**lewd or indecent act or proposal**" is a felony in the event that the same is perpetrated against a "child" under the age of 16 years. **Lewd or indecent acts or proposals** are **defined by law**, in fact ***limited by law***, to be those lewd or indecent acts or proposals made to a **minor child under the age of 16**.

This crime **cannot occur unless** the victim is **under the age of 16**. The age of the victim is an essential element of the crime – in fact, the age is one of the criteria used by the **law** to **define** the crime (see, i.e., *Riley v State*, 1997 OK CR APP 51, at ¶ 15). Lewd or Indecent proposals or acts that are perpetrated against

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unlawful *voluntary* sexual intercourse of a married person..." (emphasis added); Incest is an act of "*sexual intercourse* between persons..." (emphasis added). "incest." *Merriam-Webster Online Dictionary*. 2007. http://www.merriam-webster.com (20 Feb. 2007); Fornication is "consensual *sexual intercourse* between two persons not married to each other" (emphasis added). "fornication." *Merriam-Webster Online Dictionary*. 2007. http://www.merriam-webster.com (20 Feb. 2007); and, Adultery is "voluntary *sexual intercourse*..." (emphasis added). "adultery." *Merriam-Webster Online Dictionary*. 2007. http://www.merriam-webster.com (20 Feb. 2007)

a person beyond the age of consent *without her consent* are deemed "sexual battery" per Tit. 21 OS § 1123.

Other Sex Crimes – as defined by law:

As **defined by law**, the crimes of Sodomy[6] and Sexual Battery[7] require force if the alleged victim is beyond the age of consent. Consent of an individual who is beyond the age of consent is a valid defense to either of these charges.

If the crime of sexual abuse is to be **defined by the law**, as the statute requires, then consent of the alleged victim is a defining characteristic of child sexual abuse.

Our common and statutory laws currently recognize that a young person has the right to consent to sexual relations once she has attained the age of 16 years. By English Common Law, it was determined that a child was capable of consenting to sexual relations at the age of 10[8]. By statutory

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[6] Tit. 21 OS § 888

[7] Tit. 21 OS § 1123(B)

[8] Shockingly, by common law the age of consent is said to have originally been *10 years of age* – See, e.g., *United States v. Ransom*, 942 F.2d 775, 777 (10th Cir. 1991), citing to 4 Blackstone Comm. *212. (citing 3 Edw.I Westm. 1. ch. 13), notes that "Blackstone indicated that by the year 1275 the law in England prohibited 'carnally knowing and abusing any woman child under the age of ten years; in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.'"

mandate, the age of consent has been raised to 16 years (See, e.g., Tit. 21 OS § 1111; Tit. 21 OS § 1123(A)(B); and, Tit. 21 OS § 888). As a result of these mandates, traditional and current Oklahoma Common Law hold that a young person beyond the age of 16 years is capable of providing consent to sexual relations (See, e.g., *Fannin v State*, 1939 OK CR 20, 65 Okl.Cr. 444, 88 P.2d 671; and, *Kimbro v State, 1990 OK CR 4*, 857 P.2d 798)

Child sexual abuse upon a person beyond the age of consent, as **defined by law**, can occur only when a person responsible for the child's health, safety or welfare willfully/maliciously engages in a *non-consensual*, sexual relationship with a child under the age of eighteen. In this case, ML was beyond the age of consent and consented to the acts alleged by virtue of her conduct (See, e.g., testimony of ML: ML did not tell Mr. Sutton no or to stop (PH, Pg. 57); ML's legs are always "slightly apart" or "slightly open" (PH, Pg. 22 and 29; and, TR, Pg. 408 and 472); ML never sought to avoid Mr. Sutton, she ML always slept on the side of the bed closest to her bedroom door (TR, Pg. 489); even after ML left her mother's home, she continued to stay in contact with Mr. Sutton, bringing him cookies and sitting next to him at a family Christmas gathering (TR, Pg. 512; TR, Pg. 783; and, Defendant's Exhibit No. 5); and, inter alia, ML left her mother's home – not because of the alleged incidents – but because of a disagreement she was having with her mother (See, i.e., TR, Pg. 422 and 456).

PROPOSITION II: THE FACTS AND CONDUCT ALLEGED WITHIN THE STATE'S INFORMATION HAVE NOT BEEN DEFINED BY LAW TO CONSTITUTE A CRIME.

Under the provisions of Tit. 22 OS § 401(2), the Information "**must contain...a statement of the acts constituting the offense**, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended" (emphasis added). In addition, Tit. 22 OS § 402 commands that the Information contain "**the particular circumstances of the offense charged, when they are necessary to constitute a complete offense**" (emphasis added). "**It is an elementary principle** in criminal jurisprudence **that every material fact essential to the commission of a criminal offense must be alleged in** the...**information.**" *Prestage v State*, 1959 OK CR 3, at ¶3, 348 P.2d 865

The **statement of the acts** and **material facts** as alleged within the State's Information have not been **defined by law** to constitute a crime. It is the State's charge that the Defendant committed child sexual abuse "by intentionally fondling the breasts of M.L. **in a lewd and lascivious manner** with his hands and by inserting his finger into the vagina of M.L., age 17 years old". The State does not allege these acts to be non-consensual. Consent is **a material fact essential to the commission of the**

crime of child sexual abuse when the alleged victim is beyond the age of consent. Consent must be addressed by force of Tit. 10 OS § 7115, because the definition of sexual abuse within 7115 relies upon the definitions contained in other laws and each of those laws, including our common law, rely upon consent for their definitions (Please see footnote 3, above).

From the State's Information, it cannot be demonstrated that a crime has been alleged because the State does not allege the encounter to be non-consensual. There is not one **law** that **defines** child sexual abuse to include a consensual sexual encounter with a person who is beyond the age of consent. It matters none whether the State's child sexual abuse charge seeks to **define** child sexual abuse as rape; lewd or indecent acts or proposals as to child under 16; sexual battery; or any other sex crime. It matters none because each and every sex crime and our common law provide that a person who attains the age of 16 years has also attained the right to consent to sexual relations.

From Its previous filings, it is anticipated that the State will offer the argument of "incest" as being a proper basis for Its charge of child sexual abuse against Mr. Sutton. This argument cannot stand for two reasons. First, "incest" by definition, requires "sexual intercourse". Sexual intercourse was not pled by the State within Its Information as a **statement of the acts and material facts** that must be **alleged** as a **statement of the acts constituting the offense.** Second, when the Prosecutrix was

asked whether she and Defendant had ever had sexual intercourse, the Prosecutrix adamantly denied any sexual intercourse (TR, Pg. 500; See Also, PH, Pg. 59 – Mr. Sutton never attempted sexual intercourse).

"There can be no conviction or punishment for a crime without a formal and **sufficient** accusation. In the absence thereof **the court acquires no jurisdiction whatever, and if it assumes jurisdiction, the trial and conviction are a nullity**." *Prestage v State*, 1959 OK CR 3, at ¶3, 348 P.2d 865. The State's Information is insufficient on Its face to allege that a crime has occurred. Mr. Sutton's conviction should be set aside and this matter dismissed from any further criminal proceedings.

PROPOSITION III: TIT. 10 OS § 7115 MUST NECESSARILY BE MISINTERPRETED IN ORDER TO FIND THAT THE ACTS ALLEGED CONSTITUTE A CRIME.

The charges against Defendant are pursued either from a misinterpretation of Tit. 10 OS § 7102 and 7115 or, § 7102 and § 7115 are void for vagueness. The misinterpretation ignores the legal age of consent as defined by both common and statutory law. It assumes that because M.L. was a "child under 18 years", she has no right of consent under the facts alleged and in light of § 7115. However, neither § 7102 nor § 7115 deprive

Prosecutrix of her right to consent. In fact, the opposite is true. These statutes, when read plainly, reaffirm a Prosecutrix's right to consent.

Tit. 10 OS § 7102 provides that the policy of the State of Oklahoma is to "**provide for the protection of children who have been abused or neglected and who may be further threatened by the conduct of persons responsible for the health, safety or welfare of such children.**" 7102 (B)(5) defines a "Person responsible for a child's health, safety or welfare" to "include a parent; a legal guardian; a custodian; a foster parent; **a person eighteen (18) years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child...**" (emphasis added).

It is clear from the language that was *not* included in 7115 that the Legislature did not intend to deprive Prosecutrix of her right to consent. Five additional words at the end of the quote from 7102 (B)(5) would allow for 7115 to clearly **define by law** that the age of consent is elevated under the alleged facts of this case, viz., "either with or without consent". The Legislature knows the common law age of consent is set at 16 years of age and that the common law has been adopted by the State under Tit. 12 OS § 2 and Tit. 22 OS § 9. In addition, the Legislature knows that the age of consent being 16 years has been codified under a variety of Its statutes. Had the Legislature desired to elevate the age of consent, it could have so done, but chose not to, for whatever reason. It is error to presume that

the Legislature intended to deprive Prosecutrix of her right to consent.

The **common law** cannot be altered unless it is altered in such a way that is **clear, express and explicit.** (See, e.g., *Hughes v State,* 1994 OK CR 3, at ¶ 4, which holds that **common laws that are not altered or abolished remain in effect pursuant to 22 O.S. 1981 § 9**; See Also, Tit. 22 OS § 9[9]; See Also, *Tate v Browning-Ferris, Inc.*, 1992 OK 72, at ¶ 11, 833 P.2d 1218 "**By statutory mandate the common law remains in full force in this state, unless a statute explicitly provides to the contrary**. Okla. Stat. tit. 12, § 2 (1991). **Oklahoma law does not permit legislative abrogation of the common law by implication**; rather, **its alteration must be clearly and plainly expressed**. **An intent to change the common law will not be presumed from an ambiguous, doubtful or inconclusive text**. A presumption favors the preservation of common-law rights." (emphasis added) (See Also, Tit. 12 OS § 2[10])

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[9] – "The procedure, practice and pleadings in the courts of record of this state, in criminal actions or in matters of criminal nature, not specifically provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law."

[10] Although Tit. 12 OS § 2 "is the second paragraph under the heading of 'Civil Procedure' it has been held applicable to criminal as well as civil law." *Elliott v Mills*, 1959 OK CR 22, at ¶ 27, 335 P.2d 1104, citing to *Ex parte McNaught*, 1 Okl.Cr. 260, 100 P. 27; *State v. Smith*, Okl.Cr., 320 P.2d 719; *Spivey v. State*, 69 Okl.Cr. 397, 104 P.2d 263.

Neither Tit. 10 OS § 7115 or § 7102 can be determined to have abrogated the legal age of consent. To do so would be to **permit the Legislature to abrogate the common law by implication**, which is not allowed. Neither Tit. 10 OS § 7102 nor § 7115 identify a different age of consent. In fact, 7102 actually relies upon "**the law**" to define sexual abuse. It must be assumed that "**the law**" 7102 points to for its definition is the very same **statutory and common law** that defines the age of consent as being 16. This assumption is bolstered in light of OUJI-CR-4-138, which also recognizes the age of consent as being 16, as did Mr. Sutton's jury.

If the legal age of consent is to be abrogated when alleged within the context of a sexual abuse charge, such abrogation should be prospectively applied. In *Hughes v State*, 1994 OK CR 3, the common law defense of "born alive" was abrogated. Central to the decision for abandoning this defense was the manner in which medical and scientific technology had advanced (Id, at ¶10). Citing to Tit. 12 OS § 2, the *Hughes* Court, at ¶14 recognized Its "right and duty to develop the common law of Oklahoma to serve the evolving needs of our citizens." Having decided to abandon the common law defense of "born alive", the *Hughes* Court deliberated whether Its decision would be applied retroactively or prospectively.

Citing to *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984), the *Hughes* Court, at ¶19, noted that *Cass* based Its decision to abandon the "born alive" defense **prospectively** because "(1)

its decision may have been **unforeseeable**; (2) the possibility of increased punishment for a particular act may have been unforeseeable and could raise **constitutional questions**; and (3) a prospective-only decision would ensure '**impartiality and regularity in decision-making.**'" (emphasis added). The *Hughes* Court reasoned further, at ¶21, that the abandonment must be prospective in order to provide Defendant with "**fair warning** that her conduct would result in a criminal charge." (emphasis added) To do otherwise, would be to violate the principle on which the Ex Post Facto Clause is based (Id., at ¶21; See Also, USCS Const. Art. I, § 10, Cl 1 – "No State shall...pass any...ex post facto Law..."; and, Okl. Const. Art. II, § 15 – "No...ex post facto law...shall ever be passed.")

Our common law age of consent has a long-standing history, which has been modified from time to time by statute. It can be assumed that the modifications are based on advancements in the psychological community; advancements in the medical community such that individuals are now living longer and can therefore take the time to mature at a more deliberate pace; and, other such advancements. It may be time to elevate the age of consent. But, it cannot reasonably be said that such a rise is **foreseeable** before the Court has taken such a step – if It even chooses to do so. In order to give Mr. Sutton and the citizens of Oklahoma **fair warning**, any change in the age of consent should be applied **prospectively**.

Finally, it is assumed that the State will argue any interpretation of § 7102 and § 7115 that does not conclude Mr. Sutton's alleged acts to be criminal in nature will result in a presumption that the Legislature committed an "act of vanity" with the codification of 7102 and 7115. There is no assumption of vanity in interpreting 7115 from the face of the language used,[11] as is suggested by Appellant. Without the enactment of 7115, not one person responsible for the welfare of a child would be subject to life imprisonment for committing a sex crime against a child who is beyond the age of 16 years under the terms of, inter alia, Tit. 21 OS § 886; 888; Tit. 21 OS § 1116; Tit. 21 OS § 1123(B)(C); and, etc. In essence, Tit. 10 OS § 7115 does not represent an act of vanity, but is an enhancement statute that enhances punishment for sexual abusers.

PROPOSITION IV: IN THE ALTERNATIVE, TIT. 10 OS § 7102 AND 7115 ARE VOID FOR VAGUENESS

"It is fundamental **that** statutes creating criminal offenses must **be drawn in language sufficient to** apprise the public of exactly what conduct is forbidden. A statute **which either forbids or requires the doing of an act in terms** so vague that men of common intelligence must necessarily guess at its meaning and differ as to its

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[11] "[L]egislative intention...can be derived only from the words used in the statute." *State v. Young*, 1922 OK CR 7, 20 Okla. Crim. 383, 203 P. 484

application violates the first essential of due process of law." *State v Saunders*, 1994 OK CR 76, at ¶6, 886 P.2d 496, citing to *Hayes v. Municipal Court of Oklahoma City*, 487 P.2d 974, 976 (Okl.Cr. 1971) (emphasis added). (See Also, *State ex rel. Coats v Rakestraw*, 1980 OK CR 24, 610 P.2d 256, where in it was held that "[t]he applicable rule is stated in Connally v. General Constr. Co. 269 U.S. 385, 391, [70 L. Ed. 322, 46 S. Ct. 126]: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (Citations omitted, footnote omitted, emphasis added)

From the State's Information, it is clear that the instant charges arise out of a stepparent allegedly engaging in a sexual relationship with a stepdaughter, who was beyond the age of consent at the time of the relationship. The Information does not allege that the relationship was non-consensual[12]. As such, it must be presumed to be consensual. This presumption is borne out by testimony of the Prosecutrix.

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[12] Please see footnote 2, above.

No matter how outrageous the alleged conduct may appear, the public has by no manner been apprised that such a relationship is criminal in nature. There is nothing informative about a statute that speaks of a child being beneath the age of 18, which then goes on to refer to other, unidentified laws to "define" that which is supposed to constitute child sexual abuse. This is true especially when the only other laws that could possibly act as a continuation of the first, all provide for consensual relationships once a child is beyond the age of 16 years. Even if the common law age of consent is not added to this already confusing hodgepodge of authorities, there is no doubt that even men of *extraordinary* intelligence must necessarily guess at the meaning of the first statute. This confusion is clearly apparent within Jury Question No.2 (TR, Pg. 995-996; See Also, OR 152-153).

Furthermore, "[a] strict construction is to be applied to criminal statutes and courts should not extend them to embrace acts or conduct *not clearly* included within the prohibition of the statute. [A] [p]erson cannot be convicted of a crime *unless* the act which is committed is within both *letter* and spirit of penal statute." *Matthes v Powers*, 1967 OK CR 37, 425 P.2d 479 (emphasis added). Simply put, a statute which seeks to charge one with a criminal offense cannot be "enlarged by implication or intendment beyond the fair meaning of the language used, or what their terms reasonably justify, and will not be held to include offenses and persons other than those which are clearly described and provided for, although the court in interpreting and applying

particular statutes may think the legislature should have made them more comprehensive." *Id* (emphasis added).

Child sexual abuse cannot be interpreted through the provisions of Tit. 10 OS § 7102 and 7115 to include the acts alleged by the State. Neither 7102, nor 7115 define sexual abuse to include a consensual relationship that includes a consenting individual who is beyond the age of consent. Instead, 7102 refers ambiguously to "the" law for a definition of sexual abuse (viz., "as defined by law"). That referral points to other, unidentified laws, all of which define child sexual abuse to be an act(s) committed upon a person who has not yet attained the age of consent[13]. There is no Oklahoma law that defines child sexual abuse to include a consensual relationship involving an individual who is beyond the age of consent, at least not one that would constitute a crime under the facts and circumstances as alleged by the State. To so hold, would constitute an enlargement beyond the fair meaning of the language used within Tit. 10 OS § 7102 and 7115. The legislature needs to provide more comprehensive language if it intends for the crime of child sexual abuse to encompass those instances where the facts are as the State alleges.

As the statute stands now, 7115 provides that "[C]hild sexual abuse' means the willful or malicious sexual abuse, as defined by paragraph 6 of

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[13] As noted above, the crime of *Lewd or Indecent Proposals or Acts* is, by statute, expressly defined to include only those individuals who are "under 16" – beneath the age of consent.

subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another." Five additional words at the end of the previous sentence would allow for 7115 to clearly define by law that the facts presently at issue constitute a crime, viz., "either with or without consent". Our legislature knows the common law age of consent is set at 16 years of age. Should the Legislature desire to abrogate the age of consent, it certainly has that authority, but for whatever reason has thus far decided against such a change.

Our common law age of consent, if not applicable to the provisions of Tit. 10 OS § 7102 and 7115, is then in direct conflict with 7102 and 7115. A plain understanding of our common law provides that a person is capable of giving consent once the individual attains the age of 16. Our common law "may not be abrogated by mere implication [and will] undergo alteration (or abrogation) *solely when the intent to do so is clearly and plainly expressed.* An ambiguous legislative text is insufficient as a basis for the common law's abrogation." *McCathern v. City of Okla. City*, 2004 OK 61, 95 P.3d 1090 (emphasis added; See Also, Tit. 22 OS § 9).

Having a statute that defines child sexual abuse "by law" – without any reference whatsoever as to the law that is doing the defining – is the quintessential expression of ambiguity. The ambiguity grows when our common law defines the age of consent as being age 16 and this definition

continues to be present within other statutory law.[14] It cannot be reasonably held that the legislative text of Tit. 10 OS § 7102 and 7115 are sufficient as a basis for the abrogation of the common and statutory law age of consent in Oklahoma. As such, and in light of there being no allegation nor evidence that the relationship complained of was anything other than consensual, it further cannot be held that the crime of child sexual abuse occurred under the facts alleged by the State.

E. Conclusion

Regardless of any moral observations one can make as to the conduct alleged within the State's Information, it is clear that such conduct has not been clearly defined by law to constitute a crime. If the legislature would prefer that the conduct described by the State be deemed a crime, that is certainly Its prerogative, but in exercising Its prerogative It must first fulfill Its fundamental obligation to provide a very clear definition of which acts might deprive a person of his liberties. To do otherwise is to violate the "first essential of due process of law."

Mr. Sutton's conviction should be overturned and this matter dismissed from any further prosecution.

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[14] viz. Tit. 21 OS § 1111; and, Tit. 21 OS § 1123

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CERTIFICATE OF MAILING

I, CHRISTOPHER B. LYONS, do hereby certify that on the ___ day of August 2007, I mailed a true and correct copy of the within and foregoing pleading to Mr. Charles A. Ramsey, Ms. Rebecca Gore of the Mayes County District Attorney's Office; and, Ms. Lori Parsons, Clerk of the Court, Mayes County District Courthouse, with proper postage thereon, fully prepaid.

_____
CHRISTOPHER B. LYONS

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA.

JOHN KENNETH SUTTON,	)Appeal Case No.
	)F-2007-351
Appellant,	)(Felony)
	) [Filed : Feb 19 2008]
-v-	)Appeal From:
	)District Court of
STATE OF OKLAHOMA,	)Mayes County,
	)Oklahoma,
Appellee	)Case No. CF-06-85

APPELLANT'S BRIEF IN REPLY

Respectfully submitted,
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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA.

JOHN KENNETH SUTTON,	)Appeal Case No.
	)F-2007-351
Appellant,	)(Felony)
	) [Filed : Aug 27 2007]
-v-	)Appeal From:
	)District Court of
STATE OF OKLAHOMA,	)Mayes County,
	)Oklahoma,
Appellee	)Case No. CF-06-85

APPELLANT'S BRIEF IN REPLY

Reply to
State's Proposition I:

THE DEFINITION OF CHILD SEXUAL ABUSE DOES NOT INCLUDE, EITHER EXPLICITLY OR IMPLICTLY, CONSENTING PERSONS WHO ARE BEYOND THE AGE OF CONSENT.

In essence, the State is trying to redefine Defendant's argument as one which quibbles over the definition of the word "child". It believes that if it can define "child" as being any individual beneath the age of 18 years, then from that definition it must follow that the definition of child sexual abuse also includes *all* children beneath the age of eighteen. This argument is without merit because it is legally incorrect. Further, there is no quibble over the definition of the word "child". Defendant's argument

is over the statutory definition of the term "child sexual abuse" and the arguments that must logically flow therefrom.

State's reliance upon Tit. 10 OS § 7102 (B)(4) to prove that the "definition of child sexual abuse includes *all* children under the age of eighteen years" is misplaced – based upon the explicit language of this statute. Tit. 10 OS § 7102(B)(4) provides:

> "Child" means any unmarried person under the age of eighteen (18) years, *except* any person convicted of a crime specified in Section 7306-1.1 of this title or any person who has been certified as an adult pursuant to Section 7303-4.3 of this title and convicted of a felony.

Tit. 10 OS § 7102 (B)(4) provides clearly that not *all* children can be included within the statutory definition of child sexual abuse under § 7102 (B)(6). There are exceptions[1]. In much the same way that these statutory exceptions limit the definition of child sexual abuse, our common law age of consent[2]

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[1] Defendant acknowledges that the exceptions of 7102(B)(4) do not apply to M.L.

[2] Our common and statutory laws currently recognize that a young person has the right to consent to sexual relations once she has attained the age of 16 years. By statutory mandate, the age of consent has been raised to 16 years (See, e.g., Tit. 21 OS § 1111; Tit. 21 OS § 1123(A)(B); and, Tit. 21 OS § 888). As a result of these mandates, traditional and current Oklahoma Common Law hold that a young person beyond the age of 16 years is capable of providing consent to sexual relations (See, e.g., *Fannin v State*, 1939 OK CR 20, 65 Okl.Cr. 444, 88 P.2d 671; and, *Kimbro v State, 1990 OK CR 4*, 857 P.2d 798)

also limits the definition of child sexual abuse. Our common law is necessarily included in the definition of child sexual abuse because: our common law was in effect at the time Tit. 10 OS § 7102 (B)(6) was enacted and cannot be abrogated by mere implication[3]; and, Tit. 10 OS § 7102 (B)(6) refers to other, *unidentified* law for its definition, which necessarily includes our common and statutory age of consent laws.

State argues further that the crime of child sexual abuse must include *all* children beneath the age of 18 years; otherwise there will be an inconsistent definition of "child" if the charges are "physical abuse" as opposed to "sexual abuse". In response, Defendant submits that there is no known common law age of consent for physical abuse. In addition, the crime of "sexual abuse" is identified by a statute that refers to other, unidentified law, including law that defines the age of consent; whereas, the crime of "physical abuse" is defined as a

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[3] (See, e.g., *Hughes v State*, 1994 OK CR 3, at ¶ 4, which holds that **common laws that are not altered or abolished remain in effect pursuant to 22 O.S. 1981 § 9**; See Also, Tit. 22 OS § 9; See Also, *Tate v Browning-Ferris, Inc.*, 1992 OK 72, at ¶ 11, 833 P.2d 1218 "**By statutory mandate the common law remains in full force in this state, unless a statute explicitly provides to the contrary**. Okla. Stat. tit. 12, § 2 (1991). **Oklahoma law does not permit legislative abrogation of the common law by implication**; rather, **its alteration must be clearly and plainly expressed**. **An intent to change the common law will not be presumed from an ambiguous, doubtful or inconclusive text**. A presumption favors the preservation of common-law rights." (emphasis added) (See Also, Tit. 12 OS § 2)

"non-accidental physical or mental injury." (Tit. 10 OS § 7102(B)(2)(a). The crime of "physical abuse" does not rely upon other, unidentified law for its definition. Under either charge, the definition of "child" is the same.

Through Its final argument under State's Proposition I, State relies upon *Huskey v State*, 1999 OK CR 3, 989 P2d 1. *Huskey* is distinguishable from the instant proceeding and does not resolve the issue at hand. In *Huskey,* at ¶4, the information alleged "mental injury through exposure to explicit adult sexual conduct and acts, and by failure to prevent the same." According to the Court Clerk for Bryant County, the victim in *Huskey*, JAH, was between the ages of two years old and four years old[4]. Furthermore, the *Huskey* Court was not concerned with and did not address whether the common law age of consent has been explicitly abrogated by virtue of Tit. 10 OS § 7115.

State ultimately concludes that the authorities It relies upon to define child sexual abuse "explicitly[5]" raise the age of consent for sexual relations from 16 years of age to 18 years of age

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[4] JAH, dob 1/25/93; and the acts for which Huskeys were charged occurred between 11/1/95 and 10/4/96.

[5] "explicit" means "fully revealed or expressed without vagueness, implication, or ambiguity: leaving no question as to meaning or intent." "Explicit implies such verbal plainness and distinctness that there is no need for inference and no room for difficulty in understanding." (Merriam-Webster Online Dictionary (n.d.). Retrieved December 7 2007, from http://www.m-w.com/dictionary/explicit)

because a child is defined as a person beneath the age of eighteen years. This conclusion is one of inference and ignores the law 7102 (B)(6) relies upon to define child sexual abuse.

Reply to State's Proposition II:

THE COMMON LAW AGE OF CONSENT CANNOT BE ABROGATED BY MERE IMPLICATION, NOR HAS IT BEEN.

The common law age of consent allows persons beyond the age of consent to engage in sexual activity[6]. There is nothing explicitly contained within the provisions of Tit. 10 OS § 7102 or § 7115 that denies a young person her right to consent, nor a Defendant the right to a defense based upon such consent. To deny Defendant's defense of consent because there is "no force or require" element for child sexual abuse is to deny Defendant his right to present his theory of defense in violation of his due process rights and guarantees[7]. To the extent that

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[6] Please See FN3, above

[7] See, i.e., *Bosin v State*, 1977 OK CR 195, at ¶17-18, 565 P.2d 1061 "is entitled to an instruction on his theory of defense, provided there is evidence to support it"; *See Also*, See, i.e., *Gann v State*, 1964 OK CR 122, ¶14, 397 P.2d 686, citing to *Finley v. State*, 84 Okl.Cr. 309, 181 P.2d 849 held that: "A party is entitled to have the jury instructed on the law governing the issues according to his theory, providing such theory is tenable as a matter of law, or finds possible support in evidence."; *Gann*, Supra, ¶15, citing to Johnson v. State, 84 Okl.Cr. 368, 182 P.2d 777; and the more recent case of Bell v. State, Okl.Cr., 381 P.2d 167, where we said: "A defendant is entitled to an instruction covering his theory of defense, even though under the facts it may appear ridiculous, but even under such

the State's argument concerning no "force or require" element deprives Defendant of his constitutional rights and guarantees, such an argument must fail.

State's argument that the language of Tit. 10 OS § 7115 and 7102 (B)(5) explicitly raises the age of consent from 16 years of age to 18 years of age is without merit for at least two reasons. First, neither of these statutes explicitly state that the age of consent has been raised from 16 years of age to 18 years of age (See, Tit. 10 OS § 7115 and 7102 (B)(5). Second, Tit. 10 OS § 7102 (B)(6) specifically provides to the contrary when it defines child sexual abuse by other, unidentified law.

Tit 10 OS § 7102 (B)(6) provides that "'*sexual abuse*' includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, *as defined by law*, by a person responsible for the child's health, safety or welfare." (emphasis added) Defendant's brief-in-chief has addressed the State laws that might be the laws referenced within 7102 (B)(6). But, there are other laws that also might be discussed when considering this statute. For example, Tit. 18 USC § 2243 – *Sexual Abuse of a Minor or Ward* – provides that the defense of consent is available for the charge of sexual abuse of a minor, "which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had

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conditions the instructions must correctly state the law. If such an instruction cannot be prepared on defendant's theory within the provisions of law, then trial court is not required to so instruct."

attained the age of 16 years." To the legal professional, asserting that the State law is somehow referring back to the Federal law in this context seems ludicrous. But, to the layperson such an assertion would seem perfectly rational, particularly in light of the provisions contained within Tit. 10 OS § 7102 (B)(7) where the definition for "sexual exploitation" is explicitly limited to "*state law*".

As the State points out, the Legislature has enacted legislation that does not allow the defense of consent when a minor participates in child pornography, even if the minor consented. Tit. 21 OS § 1021.2(B) provides that "[t]he consent of the minor, or of the mother, father, legal guardian, or custodian of the minor to the activity prohibited by this section shall not constitute a defense." With this provision, it is impossible to argue the issue of consent because there is simply no question as to its meaning or intent – it is explicit. It does not refer to other, unidentified laws. A similar discussion can be had concerning the State's reference to Tit. 21 OS § 1111(A)(8), primarily because the Legislature provides a specific definition that does not rely upon other, unidentified laws. But, such consent is not prohibited by the language of Tit. 10 OS § 7102 (B)(6), nor the law that 7102 (B)(6) references for its definition of child sexual abuse.

The State's next argument is that because Tit. 21 OS § 1021.2(B) denies the right to consent, then Tit. 10 OS § 7115 must also deny this right. Such an argument will not pass Constitutional muster because it is based upon inferences and

presumptions. It fails further because every citizen is entitled to notice of the conduct that is prohibited and that notice must be explicit.[8]

For the reasons above, State's reliance upon this Court's unpublished opinion of *Cline v State of Oklahoma*, Case No. F-2006-517 (Oct 2 2007) is misguided. Like *Huskey*, *Cline* is distinguishable from this proceeding. In *Cline*, the informations were amended several times and Mr. Cline was ultimately convicted of lewd molestation in violation of Tit. 21 OS § 1123[9]. Furthermore, the *Cline* Court was not concerned with and did not address whether

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[8] *State v Saunders*, 1994 OK CR 76, at ¶6, 886 P.2d 496, citing to *Hayes v. Municipal Court of Oklahoma City*, 487 P.2d 974, 976 (Okl.Cr. 1971) (emphasis added). (See Also, *State ex rel. Coats v Rakestraw*, 1980 OK CR 24, 610 P.2d 256, where in it was held that "[t]he applicable rule is stated in Connally v. General Constr. Co. 269 U.S. 385, 391, [70 L. Ed. 322, 46 S. Ct. 126]: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (Citations omitted, footnote omitted, emphasis added)

[9] The original, first and second amended informations charged Cline with violating the provisions of Tit 10 OS § 7115 by sexually abusing CC while she was 17 years old and TC while she was 14 years old. However, Mr. Cline was convicted on the third amended information, which charged him with lewd molestation in violation of Tit. 21 OS § 1123. Through the third information, the State alleged that CC was between the ages of 6 and 7 at the time of the incident; and, TC was between the ages of 5 and 7 years at the time of the alleged incident.

the common law age of consent has been explicitly abrogated by virtue of Tit. 10 OS § 7115.

The common law age of consent is clear. Mr. Sutton's jury was aware of the common law age of consent and after hearing the testimony of M.L., asked the Court for an instruction concerning the same (TR, pg. 996; and, See Also, Defendant's Requested Jury Instruction, TR, Pg. 945-946). There is nothing explicitly contained within the provisions of Tit. 10 OS § 7102 or § 7115 that denies a young person her right to consent, nor a Defendant the right to present a defense based upon such consent. On the contrary, by incorporating other unidentified laws, the provisions of 7102(B)(6) actually confirm a young person's right to consent and a Defendant's right to present the defense of consent. To deny Defendant's consent defense because there is no "force or require" element is to deny the Defendant his right to present a defense in violation of his due process rights and guarantees. As such, the State's argument concerning no "force or require" element cannot succeed.

Reply to
State's Proposition III:

A CORRECT READING OF TIT 10 OS § 7115 AND § 7102 (B)(6) DOES NOT LEAD TO AN ABSURD RESULT

Within Its third proposition, the State argues primarily that Defendant's proposed interpretation would lead to an absurd result. The State argues

that Defendant is trying to redefine the word "child" and because of this redefining, the provisions of Tit. 10 OS § 7115 could no longer be equally applied. For Its example, the State claims, at Pg 36 of Its brief, that:

> A sixteen (16) or seventeen (17) year old child would be a child for purposes of the provision against injury to a minor child, in violation of 10 O.S. Supp. 2002, §7115(A), or for purposes of the provision against child neglect, 10 O.S. Supp. 2002, § 7115(C). Indeed, a sixteen (16) or seventeen (17) year old child would be a child for purposes of the statute against child sexual exploitation. 10 O.S. Supp. 2002 7115(G). However, under the Defendant's logic, this same sixteen or seventeen year old child would not be a child if the 'harm or threatened harm to [the] child's health, safety or welfare," 10 O.S. Supp. 2002, §7102(B)(1), was of a sexual nature (other than sexual exploitation).

To be clear, the statutes at issue are Tit. 10 OS § 7115(E) and § 7102 (B)(6). But, no matter which provision of Tit. 10 OS § 7115 or § 7102 is being discussed, each and every scenario under the provisions of these statutes involving a person beneath the age of 18 years is by definition, a scenario involving a "child"[10]. However, the issue is not whether the complaining party is a child, the issue is whether the "child" is entitled to provide consent and/or whether the Defendant is entitled to a

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[10] Save and except as to the young persons enumerated under Tit. 10 OS § 7102(B)(4)

defense of consent. To determine this issue, a review of the statute is necessary, all of which Defendant submitted in greater detail on his Brief-in-Chief.

When read correctly, the State is entirely capable of charging individuals with the crimes enacted under Tit. 10 OS § 7115 and § 7102. Some of these crimes allow the Defendant to present the defense of consent and others do not. For example, there is no consent defense available to a Defendant charged with violating the provisions of Tit. 10 § 7102 (B)(7) "sexual exploitation" because there is no age of consent law for prostitution; or, "child pornography" because the Legislature specifically abolished consent as a defense if the child is beneath the age of 18 years (See, Tit. 10 OS § 7102 (B)(7) "'Sexual exploitation' includes, but is not limited to, allowing, permitting, or encouraging a child to engage in...lewd, obscene, or pornographic photographing, filming, or depicting of a child in those acts *as defined by the state law* (emphasis added)... See also, the *state law* under Tit. 21 OS § 1021.2, which defines child pornography; and, Tit. 21 OS § 1021.2 (B), which specifically provides that "[t]he consent of the minor, or of the mother, father, legal guardian, or custodian of the minor to the activity prohibited by this section shall not constitute a defense.) However, the consent defense *is* available under the provisions of § 7102 (B)(6) for the *very same* reason it is not available under 7102 (B)(7) – because the law that defines these acts provides for the same as demonstrated within Defendant's Brief-in- Chief.

Reply to State's Proposition IV:

DEFENDANT STANDS ON HIS PROPOSITION IV AS PREVIOUSLY SUBMITTED TO THIS COURT

In lieu of providing any direct reply to the State's fourth proposition, Defendant stands on his Proposition IV as previously submitted to this Court.

- Conclusion -

The statutes at issue in this proceeding are Tit. 10 OS § 7115 and § 7102, in particular § 7102 (B)(6). By referring to other, unidentified law, 7102 (B)(6) provides the statutory "definition" for child sexual abuse. This definition confirms the common law age of consent and leaves in tact the Defendant's due process rights to present the defense of consent. Either the defense of consent is available to Defendant or because Tit. 10 OS § 7115 and § 7102 are very clear about being unclear, they are void for vagueness. For these reasons and those presented within Defendant's Brief-in-Chief, Defendant's conviction should be overturned with instructions to the Trial Court that this matter be dismissed.

Respectfully submitted,
JOHN KENNETHSUTTON, Appellant

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CERTIFICATE OF MAILING

I, CHRISTOPHER B. LYONS, do hereby certify that on the ___ day of December 2007, I mailed a true and correct copy of the within and foregoing pleading to the Honorable:

Charles A Ramsey
Rebecca Gore
MayesCountyDistrict
Attorney's Office

Lori Parsons,
Clerk of the District Court
Mayes County District Courthouse

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with proper postage thereon, fully prepaid.

_____

CHRISTOPHER B. LYONS

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN KENNETH SUTTON,	)
	) Not for Publication
Appellant,	)
v.	)[Filed: Mar 27 2008]
	)
THE STATE OF OKLAHOMA,	) Case No.
	) F-2007-351
Appellee.	)

SUMMARY OPINION

CHAPEL, JUDGE:

John Kenneth Sutton was tried by jury and convicted of Child Sexual Abuse, in violation of 10 O.S. Supp. 2002, § 7115, in the District Court of Mayes County, Case No. Cf-06-85. In accordance with the jury's recommendation, the Honorable Terry H. McBride sentenced Sutton to imprisonment in the county jail for six (6) moths and a fine of $3,000. Sutton appeals from this conviction and sentence and raises four propositions of error in support of his appeal.

I. The definition of the crime of Child Sexual Abuse, as defined by law.

II. The facts and conduct alleged within the State's information have not been defined by law to constitute a crime.

III. Tit. 10 OS § 7115 must necessarily be misinterpreted in order to find that the acts alleged constitute a crime.

IV. In the alternative, Tit. 10 OS § 7102 and 7115 are void for vagueness.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that neither reversal nor modification is required by the law and evidence.

In proposition I, II, and III, we find that the State's information was sufficient because 10 O.S. Supp. 2002, § 7115(E) prohibits willful or malicious sexual abuse of a child under 18 years of age by a person responsible for the child's health, safety, or welfare.[1] The State does not have to prove force because, although M.L. was 17 years of age at the time of the incident, she was a child defined by 10 O.S.Supp.2002, § 7115, and there is no element of force to the crime of child sexual abuse.[2] In

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[1] 10 O.S.Supp.2002, §7102 is consistent with §7115. The definition of sexual abuse in 10 O.S.Supp.2002, § 7102(B)(6) refers to a "child, as defined by law." and a definition is provided for a "child" in subsection (B)(4). That definition includes "any unmarried person under the age of eighteen (18) years, except any person who has been convicted of a crime specified as an adult pursuant to Section 7303-4.3 of this title and convicted of a felony." 10 O.S.Supp.2002, § 7104(B)(4). Although rape, incest, and lewd or indecent acts or proposals made to a child are referred to in the definition of sexual abuse in §7102, § 7115 clearly modifies the age of consent provided in those statutes to 18 years of age when the crime is committed by someone responsible for the child's health, safety, or welfare.

[2] *Huskey v. State*, 1999 OK CR 3, 9, 989 P.2d1, 6.

Proposition IV, we find that 10 O.S.Supp.2002, § 7115 and 10 O.S.Supp.2002, § 7102 are not void for vagueness because a person of ordinary intelligence would know what is prohibited under both statutes.[3]

Decision

The Judgments and Sentences of the District Court are herby **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Tile 22, Ch. 18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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---

[3] *Wilkins v. State*, 1999 OK CR 27, 8,985 P.2d 184, 186 (A statute is unconstitutionally vague if ordinary people reading it cannot understand with reasonable certainty what conduct it requires or prohibits, leaving them to guess at its meaning).

CLAREMORE, OKLAHOMA 74017
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OPINION BY CHAPEL, J.

LUMPKIN, P.J.:	CONCUR
C. JOHNSON, V.P.J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA.

JOHN KENNETH SUTTON,	)Appeal Case No.
	)F-2007-351
Appellant,	)(Felony)
	) [Filed : Apr 14 2008]
-v-	)Appeal From:
	)District Court of
STATE OF OKLAHOMA,	)Mayes County,
	)Oklahoma,
Appellee	)Case No. CF-06-85

APPELLANT'S PETITION FOR REHEARING

Respectfully submitted,
JOHN KENNETH SUTTON, Appellant

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA.

JOHN KENNETH SUTTON,	)Appeal Case No.
	)F-2007-351
Appellant,	)(Felony)
	) [Filed : Apr 14 2008]
-v-	)Appeal From:
	)District Court of
STATE OF OKLAHOMA,	)Mayes County,
	)Oklahoma,
Appellee	)Case No. CF-06-85

APPELLANT'S PETITION FOR REHEARING

COMES NOW the Appellant, JOHN KENNETH SUTTON, pursuant to Rule 3.14 of the *Rules of the Court of Criminal Appeals*, and for his Petition for Rehearing, he respectfully submits the following to this Honorable Court for Its consideration:

A. Questions Submitted:

Pursuant to Rule 3.14 of the *Rules of the Court of Criminal Appeals*, Appellant respectfully submits that the Court's decision does not address the following questions, which are decisive of the case and were duly submitted by Appellant's attorney of record.

> **Question No. 1:** Whether the Court's interpretation of Tit. 10 OS § 7102 and 7115 is a proper statutory construction.

Question No. 2: Whether the common law age of consent has been abrogated by the provisions of Tit. 10 OS § 7102 and 7115. If so, whether the public has been given fair warning of such abrogation.

B. Argument and Authority:

Question No. 1: Whether the Court's interpretation of Tit. 10 OS § 7102 and 7115 is a proper statutory construction.

Appellant respectfully submits that the Court has constructed the statutes at issue in a way that is at odds with the criteria for statutory interpretation. These criteria have a long-standing history and bear directly upon the Appellant' fundamental rights of due process.

Statutory construction considers a variety of factors. Primarily, the Court is charged with providing a construction that ascertains and gives effect "to the intention of the Legislature *as expressed in the statute.*" *State v Anderson*, 1998 OK CR 67, at ¶8, 972 P2d 32 (emphasis added). In keeping with this charge and as it relates to Appellant's Petition for Rehearing, the factors to be considered include[1]:

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[1] *State v. Anderson*, 1998 OK CR 67, ¶3, 972 P.2d 32
...fundamental rule of statutory construction [is] to ascertain and give effect to the intention of the Legislature as expressed in the statute. Thomas v. State, 404 P.2d 71, 73 (Okl.Cr.1965). To ascertain the intention of the Legislature in the enactment of a statute, the court may look to each part of the same, to

1. The nature of the "evils and mischiefs to be remedied";
2. The "natural or absurd consequences of any particular interpretation"; and,
3. "...a construction according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."

Appellant respectfully submits that if each of these factors are properly considered, his Petition for Rehearing should be granted, with the charges against him dismissed. No other reasoned interpretation of Tit. 10 OS § 7102 and 7115 can be had.

Tit. 10 OS § 7102 and 7115 were enacted to prevent child abuse. They were not enacted to deprive persons of their rights to consent, to freedom of association, nor any other constitutionally protected right. This is clear from the purpose of

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other statutes upon the same or relative subjects, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation. Id. See also Lozoya v. State, 932 P.2d 22, 29 (Okl.Cr.1996). A statute should be given a construction according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision. Wallace v. State, 910 P.2d 1084, 1086 (Okl.Cr.1996). It is the text of the statute which gives notice to the citizen of the prohibited conduct subject to prosecution and the scope of conduct which is allowable to defend against prohibited conduct committed against a person. Therefore, the text of the statute should guide this Court's interpretation of it.

these statutes, which is found at Tit. 10 OS § 7102 and provides that the legislature is concerned with protecting children "*who have been abused* or neglected and who may be further threatened by the conduct of persons responsible for the health, safety or welfare of such children." Tit. 10 OS § 7102(A)(1) (emphasis added). (It is noteworthy further that "persons responsible for the health, safety or welfare of such children" includes each and every person who resides within the same dwelling as the child and who is beyond the age of eighteen (18) years.) [2]

Against the backdrop of the Legislature's stated purpose for Tit. 10 OS § 7102 and 7115; and, the definition of "persons responsible for the health, safety or welfare of such children", there are "natural and absurd consequences" that occur with a holding from this Court that deprives a young person of his/her right to consent because of the plain language of these statutes[3]. For example, it would be absurd

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[2] Tit. 10 OS § 7102(B)(5) provides that a "'Person responsible for a child's health, safety or welfare' includes a parent; a legal guardian; a custodian; a foster parent; a person eighteen (18) years of age or older with whom the child's parent cohabitates or *any other adult residing in the home of the child*; an agent or employee of a public or private residential home, institution, facility or day treatment program as defined in Section 175.20 of this title; or an owner, operator, or employee of a child care facility as defined by Section 402 of this title..."(emphasis added)

[3] At the last sentence of FN1 of this Court's opinion, the Court found:

> Although rape, incest, and lewd or indecent acts or proposals made to a child are referred to in the definition of sexual abuse in § 7102, § *7115 clearly modifies the age of consent* provided in those statutes *to*

to state that an eighteen year old female had sexually abused her seventeen year old paramour, simply because they were living in the same residence when they engaged in sexual acts. It is equally as absurd to find that a relationship between a seventeen year old and a forty year old is legitimate while they are having sexual relations and living in separate residences, but becomes sexual abuse once the seventeen year old moves into the home of the forty year old and continues with the same sexual relations. These absurd results are precisely the sort of result that must occur as a matter of law, because of this Court's holding in this case. Appellant respectfully submits that the Court's present interpretation of Tit. 10 OS § 7102 and 7115 will lead to absurd consequences and should be withdrawn.

Statutory construction also directs Courts to the attention of other statutes "upon the same or relative subjects". *Anderson*, Id. In this case, as mentioned within Appellant's Brief in Chief, a look to other portions of the statutes at issue, the common law age of consent, the Oklahoma Uniform Jury Instructions and statutes related to the topic of sexual abuse, allows for the inescapable determination that a young person beyond the age of sixteen years retains her right to consent to sexual relations. (Please see, i.e., Tit. 21 OS § 1021.2(B); and, Tit. 21 O.S. § 1111(A)(8). Had the Legislature

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18 years of age *when the crime is committed by someone responsible for the child's health, safety, or welfare.* (emphasis added)

intended otherwise, it would have plainly expressed otherwise within the provisions of Tit. 10 OS § 7102 and 7115 or any of the other statutes that 7115 points to for its definition of sexual abuse.

Appellant respectfully submits that the Court's construction of Tit. 10 OS § 7102 and 7115 is in error and should be withdrawn.

Question No. 2: Whether the common law age of consent has been abrogated by the provisions of Tit. 10 OS § 7102 and 7115. If so, whether the public has been given fair warning of such abrogation.

By his Brief-in-Chief, Appellant submitted that the provisions of Tit. 10 OS § 7102 and 7115 have not redefined the common law age of consent for sexual relations in a clear and unambiguous manner. The common law cannot be altered unless it is altered in such a way that is clear, express and explicit. (See, e.g., *Hughes v State*[4], 1994 OK CR 3, at ¶ 4, which holds that common laws that are not altered or abolished remain in effect pursuant to 22

[4] Appellant is aware of the Court's concern that Appellant may go without punishment if the law is applied prospectively, much the same way the Court was concerned with a lack of punishment in *Hughes v State*, 1994 OK CR 3. To that end, Appellant respectfully submits that his previously unblemished record has been forever altered by the course of the proceedings and the county jail sentence he has already served.

O.S. 1981 § 9; See Also, Tit. 22 OS § 9[5]; See Also, *Tate v Browning-Ferris, Inc.*, 1992 OK 72, at ¶ 11, 833 P.2d 1218 "By statutory mandate the common law remains in full force in this state, unless a statute explicitly provides to the contrary. Okla. Stat. tit. 12, § 2 (1991). Oklahoma law does not permit legislative abrogation of the common law by implication; rather, its alteration must be clearly and plainly expressed. An intent to change the common law will not be presumed from an ambiguous, doubtful or inconclusive text. A presumption favors the preservation of common-law rights." (emphasis added) (See Also, Tit. 12 OS § 2[6])

Neither Tit. 10 OS § 7115 or § 7102 can be determined to have abrogated the legal age of consent. To do so would be to permit the Legislature to abrogate the common law by implication, which is not allowed. Neither Tit. 10 OS § 7102 nor § 7115 identify a different age of consent. In fact, 7102 actually relies upon "the law" to define sexual abuse. It must be assumed that "the law" 7102 points to for its definition is the very same statutory and common law that defines the age of consent as being 16. This

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[5] – "The procedure, practice and pleadings in the courts of record of this state, in criminal actions or in matters of criminal nature, not specifically provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law."

[6] Although Tit. 12 OS § 2 "is the second paragraph under the heading of 'Civil Procedure' it has been held applicable to criminal as well as civil law." *Elliott v Mills*, 1959 OK CR 22, at ¶ 27, 335 P.2d 1104, citing to *Ex parte McNaught*, 1 Okl.Cr. 260, 100 P. 27; *State v. Smith*, Okl.Cr., 320 P.2d 719; *Spivey v. State*, 69 Okl.Cr. 397, 104 P.2d 263.

If the legal age of consent is to be abrogated when alleged within the context of a sexual abuse charge, such abrogation should be prospectively applied. In *Hughes v State*, 1994 OK CR 3, the common law defense of "born alive" was abrogated. Central to the decision for abandoning this defense was the manner in which medical and scientific technology had advanced (Id, at ¶10). Citing to Tit. 12 OS § 2, the *Hughes* Court, at ¶14 recognized Its "right and duty to develop the common law of Oklahoma to serve the evolving needs of our citizens." Having decided to abandon the common law defense of "born alive", the *Hughes* Court then correctly decided to enact Its decision prospectively, as should be done in the instant case[7].

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[7] *Hughes*, Id., at ¶ 20 - Due process requires that a criminal statute give fair warning of the conduct which it prohibits. Specifically, the Supreme Court of the United States has held that:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). With respect to judicial interpretation of a criminal statute, the Court has further held that:

C. Conclusion:

Appellant respectfully submits that his Petition for Rehearing should be granted. Constructing the provisions of Tit. 10 OS § 7102 and 7115 as the Court has represents a grave miscarriage of justice. These statutes do not provide the warnings required by the Constitution and neither do they provide sufficient notice for the abrogation of the common law age of consent.

Mr. Sutton humbly submits further that he has not gone without punishment. His reputation in the community has been forever altered, as has his family. Mr. Sutton has already served the sentence his Jury decided upon. He is a lifelong resident of Oklahoma. He has two grown children. Prior to this

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> an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one `that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or `that aggravates a crime, or makes it greater than it was, when committed.' . . . The fundamental principle that `the required criminal law must have existed when the conduct in issue occurred' . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a statute is `unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.

Bouie v. Columbia, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 1702-03, 12 L.Ed.2d 894 (1964) (emphasis added) (citations omitted)

proceeding, he maintained the same employment for over twenty-two years. He had been a voluntary firefighter for nearly as many years. He had not had so much as a speeding ticket prior to the instant proceedings. Members of the Oklahoma Highway Patrol and Adair Fire Department testified at trial of Mr. Sutton's character.

Respectfully submitted,
JOHN KENNETH SUTTON, Appellant

By: _____
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CERTIFICATE OF MAILING

I, CHRISTOPHER B. LYONS, do hereby certify that on the ___ day of April 2008, I mailed a true and correct copy of the within and foregoing pleading to The Honorable Charles A. Ramsey and Rebecca Gore of the Mayes County District Attorney's Office; The Honorable W.A. Drew Edmondson, Attorney General of Oklahoma, Theodore M. Peeper, Assistant Attorney General, 313 NE 21st Street, Oklahoma City, Oklahoma 73105; and, Ms. Lori Parsons, Clerk of the Court, Mayes County District Courthouse, with proper postage thereon, fully prepaid.

_____

CHRISTOPHER B. LYONS

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN KENNETH SUTTON,	)	
	)	
Appellant,	)	
v.	)	[Filed: Apr 29 2008]
	)	
THE STATE OF OKLAHOMA,	)	Case No.
	)	F-2007-351
Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

John Kenneth Sutton was tried by jury and convicted of child sexual abuse, in violation of 10 O.S.Supp.2002, § 7115, in the District Court of Mayes County, Case No. CF-06-85. In accordance with the jury's recommendation, the Honorable Terry H. McBride sentenced Sutton to imprisonment in the county jail for six (6) months and a fine of $3000. Sutton appealed from conviction and sentence.

By its March 27, 2008, unpublished opinion, this court affirmed Sutton conviction and sentence. Sutton is now before the Court on a Petition for Rehearing. A Petition for Rehearing shall be filed for two reasons only:

(1) Some questions decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

(2) The decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.[1]

Sutton's argument in his Petition for Rehearing fail to meet the criteria set forth in Rule 3.14 and is denied.[2]

IT IS THEREFORE THE ORDER OF THE COURT that the Petition for Rehearing is **DENIED**. The Clerk of the Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 29th day of April, 2008.

GARY L. LUMPKIN,
Presiding Judge

CHARLES A. JOHNSON,
Vice Presiding Judge

CHARLES S. CHAPEL,

[1] Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2007).

[2] Sutton's petition presents the Court with no arguments or authorities that were not considered in the opinion denying his appeal.

Judge

ARLENE JOHNSON,
Judge

DAVID LEWIS,
Vice Judge

ATTEST:

Clerk

INSTRUCTION No._____

No person may be convicted of the sexual abuse of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person responsible for the child's health or safety welfare;

Second, willfully;

Third, engaged in;

Fourth, sexual child abuse by looking upon, touching, mauling or feeling the body or private parts or inserting a finger into the vagina in a lewd and lascivious manner without the consent of the Prosecutrix;

Fifth, of a child under the age of eighteen.

OUJI-CR 4-39
(2000 Supp.)

INSTRUCTION No._____

You are instructed that as a matter of law a minor under the age of sixteen is incapable of giving consent to engaging in sexual conduct which is otherwise prohibited by law and the consent of a minor under the age of sixteen to such activity should be disregarded by you in determining the question of the defendant's guilt.

OUJI-CR 4-138
(2000 Supp.)

INSTRUCTION NUMBER 6

No person may be convicted of CHILD SEXUAL ABUSE unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person responsible for the child's health or safety welfare;

Second, willfully;

Third, engaged in;

Fourth, sexual child abuse by looking upon, touching, mauling or feeling the body or private parts or inserting a finger into the vagina;

Fifth, of a child under the age of eighteen.

OUJI-CR 4-39

CF-06-85 [Filed: Feb 12 2007]

Is instruction #6 the law, or is the wording unique to this case? ↓

OUJI-CR 4-39

[Question from the Jury – original is handwritten]

Received @ 5:35 pm
2-12-07
[handwritten notation]

CF-06-85 State v. Sutton
[Filed: Feb 12 2007]

Received from jury during deliberations at 5:35 P.M. on 2-12-07

Question: Is instruction #6 the law, or is the wording unique to this case?
OUJI-CR 4-39

Answer: Instruction #6 together with all of the instructions given you is the law to be applied in deciding this case.

Sent into the jury deliberation room at 5:45 P.M. on 2-12-07

Terry H. McBride
Associate District Judge

Oklahoma Statutes Citationized
Title 10. Children
Chapter 71 Oklahoma Child Abuse Reporting and Prevention Act
Section 7102 - Public Policy - Protection of Children - Definitions

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Superceded Superceded Superceded
Effective: 05/17/2005

Cite as: O.S. §, __ __

A. 1. It is the policy of this state to provide for the protection of children who have been abused or neglected and who may be further threatened by the conduct of persons responsible for the health, safety or welfare of such children.

2. It is the policy of this state that in responding to a report of child abuse or neglect:

a. in any necessary removal of a child from the home,

b. in placements of a child required pursuant to the Oklahoma Child Abuse Reporting and Prevention Act, and

c. in any administrative or judicial proceeding held pursuant to the provisions of the Oklahoma Child Abuse Reporting and Prevention Act,

that the best interests of the child shall be of paramount consideration.

B. Except as otherwise provided by and used in the Oklahoma Child Abuse Reporting and Prevention Act:

1. "Abuse" means harm or threatened harm to a child's health, safety or welfare by a person responsible for the child's health, safety or welfare, including sexual abuse and sexual exploitation;

2. "Harm or threatened harm to a child's health or safety" includes, but is not limited to:

   a. nonaccidental physical or mental injury,

   b. sexual abuse,

   c. sexual exploitation,

   d. neglect,

   e. failure or omission to provide protection from harm or threatened harm, or

   f. abandonment;

3. "Neglect" means failure or omission to provide:

   a. adequate food, clothing, shelter, medical care, and supervision,

b. special care made necessary by the physical or mental condition of the child, or

c. abandonment;

4. "Child" means any person under the age of eighteen (18) years, except any person convicted of a crime specified in Section 7306-1.1 of this title or any person who has been certified as an adult pursuant to Section 7303-4.3 of this title and convicted of a felony;

5. "Person responsible for a child's health, safety or welfare" includes a parent; a legal guardian; a custodian; a foster parent; a person eighteen (18) years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child; an agent or employee of a public or private residential home, institution, facility or day treatment program as defined in Section 175.20 of this title; or an owner, operator, or employee of a child care facility as defined by Section 402 of this title;

6. "Sexual abuse" includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law, by a person responsible for the child's health, safety or welfare;

7. "Sexual exploitation" includes, but is not limited to, allowing, permitting, or encouraging a child to engage in prostitution,

as defined by law, by a person responsible for the child's health, safety or welfare or allowing, permitting, encouraging, or engaging in the lewd, obscene, or pornographic photographing, filming, or depicting of a child in those acts as defined by the state law, by a person responsible for the child's health, safety or welfare;

8. "Multidisciplinary child abuse team" means any team established pursuant to the provisions of Section 7110 of this title;

9. "Child advocacy center" means an entity that is a full member in good standing with the National Children's Alliance. Child advocacy centers shall be classified, based on the child population of a district attorney's district, as follows:

    a. nonurban centers in districts with child populations that are less than sixty thousand (60,000),

    b. mid-level nonurban centers in districts with child populations equal to or greater than sixty thousand (60,000), but not including Oklahoma and Tulsa Counties, and

    c. urban centers in Oklahoma and Tulsa Counties;

10. "Assessment" means a systematic process utilized by the Department of Human Services to respond to reports of alleged child abuse or neglect which, according to priority guidelines established by the Department, do not constitute a serious and immediate threat to the child's health, safety or welfare. The assessment includes, but is not limited to, the following elements:

    a. an evaluation of the child's safety, and

    b. a determination regarding the family's need for services;

11. "Investigation" means an approach utilized by the Department to respond to reports of alleged child abuse or neglect which, according to priority guidelines established by the Department, constitute a serious and immediate threat to the child's health or safety. An investigation includes, but is not limited to, the following elements:

    a. an evaluation of the child's safety or welfare,

    b. a determination whether or not child abuse or neglect occurred, and

    c. a determination regarding the family's need for prevention and intervention-related services;

12. "Services not needed determination" means a report in which a child protective services worker, after an investigation, determines that there is no identified risk of abuse or neglect;

13. "Services recommended determination" means a report in which a child protective services worker, after an investigation, determines the allegations to be unfounded or for which there is insufficient evidence to fully determine whether child abuse or neglect has occurred, but one in which the Department determines that the child and the child's family could benefit from receiving prevention and intervention-related services;

14. "Confirmed report - services recommended" means a report which is determined by a child protective services worker, after an investigation and based upon some credible evidence, to constitute child abuse or neglect which is of such a nature that the Department recommends prevention and intervention-related services for the parents or persons responsible for the care of the child or children, but for which initial court intervention is not required;

15. "Confirmed report - court intervention" means a report which is determined by a child protective services worker, after an investigation and based upon some credible evidence, to constitute child abuse or neglect which is of such a nature that the Department

finds that the child's health, safety or welfare is threatened;

16. "Child protective services worker" means a person employed by the Department of Human Services with sufficient experience or training as determined by the Department in child abuse prevention and identification;

17. "Department" means the Department of Human Services;

18. "Commission" means the Commission for Human Services; and

19. "Prevention and intervention-related services" means community-based programs that serve children and families on a voluntary and time-limited basis to help reduce the likelihood or incidence of child abuse and neglect.

Historical Data

Added by Laws 1965, SB 18, c. 43, § 1, emerg. eff. March 18, 1965; Amended by Laws 1975, SB 304, c. 98, § 1, emerg. eff. April 30, 1975; Amended by Laws 1985, HB 1021, c. 90, § 2, eff. November 1, 1985; Amended by Laws 1992, HB 2022, c. 265, § 1, emerg. eff. May 25, 1992; Amended by Laws 1995, HB 1993, c. 353, § 2, eff. November 1, 1995; Renumbered from 21 O.S. § 845 by Laws 1995, c. 353, § 20, eff. November 1, 1995; Amended by Laws 1996, HB 2428, c. 3, § 4, emerg. eff. March 6, 1996; Amended by Laws 1996, HB 2053, c. 200, § 16, eff. November 1,

1996; Amended by Laws 1997, HB 1927, c. 386, § 10, emerg. eff. June 10, 1997 (superseded document available); Amended by Laws 1998, c. 416, § 11, eff. November 1, 1998 (superseded document available); Amended by Laws 2000, HB 2452, c. 374, § 30, emerg. eff. July 1, 2000 (superseded document available); Amended by Laws 2001, SB 133, c. 64, § 1, emerg. eff. July 1, 2001 (superseded document available); Amended by Laws 2002, SB 1609, c. 487, § 1, emerg. eff. July 1, 2002 (superseded document available).

Oklahoma Statutes Citationized
Title 10. Children
Chapter 71 Oklahoma Child Abuse Reporting and Prevention Act
Section 7115 - Abuse of Child - Penalty

Superceded Superceded Superceded
Effective: 07/01/2002

Cite as: O.S. §, __ __

A. Any parent or other person who shall willfully or maliciously engage in child abuse shall, upon conviction, be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment. As used in this subsection, "child abuse" means the willful or malicious abuse, as defined by paragraph 1 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another, or the act of willfully or maliciously injuring, torturing or maiming a child under eighteen (18) years of age by another.

B. Any parent or other person who shall willfully or maliciously engage in enabling child abuse shall, upon conviction, be punished by imprisonment in the State Penitentiary not exceeding life

imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00) or both such fine and imprisonment. As used in this subsection, "enabling child abuse" means the causing, procuring or permitting of a willful or malicious act of child abuse, as defined by paragraph 1 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another. As used in this subsection, "permit" means to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of abuse as proscribed by this subsection.

C. Any parent or other person who shall willfully or maliciously engage in child neglect shall, upon conviction, be punished by imprisonment in the State Penitentiary not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment. As used in this subsection, "child neglect" means the willful or malicious neglect, as defined by paragraph 3 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another.

D. Any parent or other person who shall willfully or maliciously engage in enabling child neglect shall,

upon conviction, be punished by imprisonment in the State Penitentiary not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment. As used in this subsection, "enabling child neglect" means the causing, procuring or permitting of a willful or malicious act of child neglect, as defined by paragraph 3 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another. As used in this subsection, "permit" means to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of neglect as proscribed by this subsection.

E. Any parent or other person who shall willfully or maliciously engage in child sexual abuse shall, upon conviction, be punished by imprisonment in the State Penitentiary not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment. As used in this section, "child sexual abuse" means the willful or malicious sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another.

F. Any parent or other person who shall willfully or maliciously engage in enabling child sexual abuse shall, upon conviction, be punished by imprisonment in the State Penitentiary not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment. As used in this subsection, "enabling child sexual abuse" means the causing, procuring or permitting of a willful or malicious act of child sexual abuse, as defined by paragraph 6 of subsection B of Section 7102 of this title, of a child under the age of eighteen (18) by another. As used in this subsection, "permit" means to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of sexual abuse as proscribed by this subsection.

G. Any parent or other person who shall willfully or maliciously engage in child sexual exploitation shall, upon conviction, be punished by imprisonment in the State Penitentiary not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment. As used in this subsection, "child sexual exploitation" means the willful or malicious sexual exploitation, as defined by paragraph 7 of

subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another.

H. Any parent or other person who shall willfully or maliciously engage in enabling child sexual exploitation shall, upon conviction, be punished by imprisonment in the State Penitentiary not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment. As used in this subsection, "enabling child sexual exploitation" means the causing, procuring or permitting of a willful or malicious act of child sexual exploitation, as defined by paragraph 7 of subsection B of Section 7102 of this title, of a child under eighteen (18) years of age by another. As used in this subsection, "permit" means to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of sexual exploitation as proscribed by this subsection.

Historical Data

Laws 1963, HB 781, c. 53, § 1, emerg. eff. May 8, 1963; Amended by Laws 1975, HB 1079, c. 250, § 2, emerg. eff. June 2, 1975; Amended by Laws 1977, SB 335, c. 172, § 1, eff. October 1, 1977; Amended by Laws 1982, HB 1446, c. 7, § 1, eff. October 1, 1982; Amended by Laws 1989, HB 1514, c. 348, § 12, eff.

November 1, 1989; Amended by Laws 1990, HB 2334, c. 224, § 5, eff. September 1, 1990; Renumbered from 21 O.S. § 843 by Laws 1995, HB 1993, c. 353, §§ 15, 20, eff. November 1, 1995; Amended by Laws 1995, HB 1993, c. 353, §§ 15, 20, eff. November 1, 1995; Amended by Laws 1996, HB 2053, c. 200, § 15, eff. November 1, 1996; Amended by Laws 1997, HB 1213, c. 133, § 127, eff. July 1, 1999 (superseded document available); Amended by Laws 1999, 1st Extr.Sess., HB 1009, c. 5, § 57, emerg. eff. July 1, 1999 (superseded document available); Amended by Laws 2000, HB 2037, c. 291, § 1, eff. November 1, 2000 (superseded document available).

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 33 – Adultery
Section 871 - Definition of Adultery – Prosecution

Cite as: O.S. §, __ __

Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife as the case may be, or by the husband or wife of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery.

Historical Data

R.L. 1910, § 2431.

Title 21. Crimes and Punishments.
Chapter 34
§885. Incest-Penalty

SUPERSEDED SUPERSEDED SUPERSEDED

Effective July 1, 1999

Persons who, being within the degrees of consanguinity within which marriages are by the laws of the state declared incestuous and void, intermarry with each other, or commit adultery or fornication with each other, shall be guilty of a felony.

Historical Data

R.L. 1910, § 2443; Amended by Laws 1997, H.B. No. 1213 c. 133. § 262, emerg. Effective Date Amended to July 1, 1999 by Laws 1998, c. 2 (First Extraordinary Session), §§ 23-26, effective June 19, 1998 (superseded document available)

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 34
Section 886 - Crime Against Nature - Penalty

Superceded Superceded Superceded
Effective: 11/01/2002

Cite as: O.S. §, __ __

Any person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for a period of not more than twenty (20) years. Any person convicted of a second violation of this section, where the victim of the second offense is a person under sixteen (16) years of age, shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of this section, where the victim of the third or subsequent offense is a person under sixteen (16) years of age, shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court.

Historical Data

R.L. 1910, § 2444; Amended by Laws 1992, SB 912, c. 289, § 1, emerg. eff. May 25, 1992; Amended by Laws 1997, HB 1213, c. 133, § 263 (effective date amended to July 1, 1999, by Laws 1998, 1st Extr. Sess., c. 2, §§ 23-26, emerg. eff. June 19, 1998) (superseded document available); Amended by Laws 1999, 1st Extr. Sess., HB 1009, c. 5, § 167, emerg. eff. July 1, 1999 (superseded document available).

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 34 - Bigamy, Incest, and Sodomy
Section 888 - Forcible Sodomy

Cite as: O.S. §, __ __

Multiple Amendments Enacted During the 2002 Legislative Session

Version 1 (as amended by Laws 2002, SB 1425, c. 455, § 4, emerg. eff. June 5, 2002):

A. Any person who forces another person to engage in the detestable and abominable crime against nature, pursuant to Section 886 of this title, upon conviction, is guilty of a felony punishable by imprisonment in the State Penitentiary for a period of not more than twenty (20) years, except as provided in Section 3 of this act. Any person convicted of a second violation of this section, where the victim of the second offense is a person under sixteen (16) years of age, shall not be eligible for probation, suspended or deferred sentence.

B. The crime of forcible sodomy shall include:

1. Sodomy committed by a person over eighteen (18) years of age upon a person under sixteen (16) years of age; or

2. Sodomy committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime; or

3. Sodomy accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the victim or the person committing the crime; or

4. Sodomy committed by a state, county, municipal or political subdivision employee or a contractor or an employee of a contractor of the state, a county, a municipality or political subdivision of this state upon a person who is under the legal custody, supervision or authority of a state agency, a county, a municipality or a political subdivision of this state.

Version 2 (as amended by Laws 2002, SB 1536, c. 460, § 9, eff. November 1, 2002, and Laws 2006, SB 682, c. 62, § 4, emerg. eff. April 17, 2006 and as amended by Laws 2007, HB 1760, c. 261, § 9, eff. November 1, 2007):

A. Any person who forces another person to engage in the detestable and abominable crime against nature, pursuant to Section 886 of this title, upon conviction, is guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for a period of not more than twenty (20) years. Except for persons sentenced to life or

life without parole, any person sentenced to imprisonment for two (2) years or more for a violation of this subsection shall be required to serve a term of post-imprisonment supervision pursuant to subparagraph f of paragraph 1 of subsection A of Section 991a of Title 22 of the Oklahoma Statutes under conditions determined by the Department of Corrections. The jury shall be advised that the mandatory post-imprisonment supervision shall be in addition to the actual imprisonment. Any person convicted of a second violation of this section, where the victim of the second offense is a person under sixteen (16) years of age, shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of this section, where the victim of the third or subsequent offense is a person under sixteen (16) years of age, shall be punished by imprisonment in the custody of the Department of Corrections for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court. Any person convicted of a violation of this subsection after having been twice convicted of a violation of subsection A of Section 1114 of this title, a violation of Section 1123 of this title or sexual abuse of a child pursuant to Section 7115 of Title 10 of the Oklahoma Statutes, or of any attempt to commit any of these offenses or any combination of said offenses, shall be punished by imprisonment in the custody of the Department of Corrections for a term of life or life without parole.

B. The crime of forcible sodomy shall include:

1. Sodomy committed by a person over eighteen (18) years of age upon a person under sixteen (16) years of age; or

2. Sodomy committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime; or

3. Sodomy accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the victim or the person committing the crime; or

4. Sodomy committed by a state, county, municipal or political subdivision employee or a contractor or an employee of a contractor of the state, a county, a municipality or political subdivision of this state upon a person who is under the legal custody, supervision or authority of a state agency, a county, a municipality or a political subdivision of this state; or

5. Sodomy committed upon a person who is at least sixteen (16) years of age but less than twenty (20) years of age and is a student of any public or private secondary school, junior high or high school, or public vocational school, with a person who is eighteen (18) years of age

or older and is employed by the same school system.

Historical Data

Added by Laws 1981, SB 527, c. 57, § 1, eff. October 1, 1981; Amended by Laws 1982, HB 1489, c. 11, § 1, eff. October 1, 1982; Amended by Laws 1990, HB 2334, c. 224, § 1, eff. September 1, 1990; Amended by Laws 1992, SB 912, c. 289, § 2, emerg. eff. May 25, 1992; Amended by Laws 1997, HB 1213, c. 133, § 264 (effective date amended to July 1, 1999, by Laws 1998, 1st Extr. Sess., HB 1002, c. 2, §§ 23-26, emerg. eff. June 19, 1998) (superseded document available); Amended by Laws 1999, 1st Extr. Sess., HB 1009, c. 5, § 168, emerg. eff. July 1, 1999 (superseded document available); Amended by Laws 2000, HB 2121, c. 175, § 1, eff. November 1, 2000 (superseded document available); Amended by Laws 2002, SB 1425, c. 455, § 4, emerg. eff. June 5, 2002; Amended by Laws 2002, SB 1536, c. 460, § 9, eff. November 1, 2002 (superseded document available); Amended by Laws 2006, SB 682, c. 62, § 4, emerg. eff. April 17, 2006 (superseded document available); Amended by Laws 2007, HB 1760, c. 261, § 9, eff. November 1, 2007 (superseded document available).

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 35 - Maliciously, Forcibly or Fraudulently Taking or Enticing Away Children
Section 891 - Maliciously, Forcibly or Fraudulently Taking or Enticing Away Children – Punishment

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Superceded Superceded Superceded
Effective: 07/01/2000

Cite as: O.S. §, __ __

Whoever maliciously, forcibly or fraudulently takes or entices away any child under the age of twelve (12) years, with intent to detain and conceal such child from its parent, guardian or other person having the lawful charge of such child shall be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year, or by a fine not exceeding Five Hundred Dollars ($500.00), or by both such fine and imprisonment.

Historical Data

R.L. 1910, § 2435; Amended by Laws 1997, HB 1213, c. 133, § 265, emerg. eff. July 1, 1998 (effective date amended to July 1, 1999, by Laws 1998, 1st Extr. Sess., HB 1002, c. 2, § 23, emerg. eff. June 19, 1998) (superseded document available); Amended by Laws

1999, 1st Extr. Sess, HB 1009, c. 5, § 169, emerg. eff. July 1, 1999 (superseded document available).

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 35 - Maliciously, Forcibly or Fraudulently Taking or Enticing Away Children
Section 891 - Maliciously, Forcibly or Fraudulently Taking or Enticing Away Children - Punishment

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Superceded Superceded Superceded
Effective: 11/01/2007

Cite as: O.S. §, __ __

Whoever maliciously, forcibly or fraudulently takes or entices away any child under the age of sixteen (16) years, with intent to detain and conceal such child from its parent, guardian or other person having the lawful charge of such child or to transport such child from the jurisdiction of this state or the United States without the consent of the person having lawful charge of such child shall, upon conviction, be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding ten (10) years.

Historical Data

R.L. 1910, § 2435; Amended by Laws 1997, HB 1213, c. 133, § 265, emerg. eff. July 1, 1998 (effective date

amended to July 1, 1999, by Laws 1998, 1st Extr. Sess., HB 1002, c. 2, § 23, emerg. eff. June 19, 1998) (superseded document available); Amended by Laws 1999, 1st Extr. Sess, HB 1009, c. 5, § 169, emerg. eff. July 1, 1999 (superseded document available); Amended by Laws 2000, SB 1516, c. 370, § 13, emerg. eff. July 1, 2000 (superseded document available).

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 35 - Maliciously, Forcibly or Fraudulently Taking or Enticing Away Children
Section 891 - Maliciously, Forcibly or Fraudulently Taking or Enticing Away Children – Punishment

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Cite as: O.S. §, __ __

Whoever maliciously, forcibly or fraudulently takes or entices away any child under the age of sixteen (16) years, with intent to detain or conceal such child from its parent, guardian or other person having the lawful charge of such child or to transport such child from the jurisdiction of this state or the United States without the consent of the person having lawful charge of such child shall, upon conviction, be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections not exceeding ten (10) years.

Except for persons sentenced to life or life without parole, any person sentenced to imprisonment for

two (2) years or more for a violation of this section and the offense involved sexual abuse or sexual exploitation, shall be required to serve a term of post-imprisonment supervision pursuant to subparagraph f of paragraph 1 of subsection A of Section 991a of Title 22 of the Oklahoma Statutes under conditions determined by the Department of Corrections. The jury shall be advised that the mandatory post-imprisonment supervision shall be in addition to the actual imprisonment.

Historical Data

R.L. 1910, § 2435; Amended by Laws 1997, HB 1213, c. 133, § 265, emerg. eff. July 1, 1998 (effective date amended to July 1, 1999, by Laws 1998, 1st Extr. Sess., HB 1002, c. 2, § 23, emerg. eff. June 19, 1998) (superseded document available); Amended by Laws 1999, 1st Extr. Sess, HB 1009, c. 5, § 169, emerg. eff. July 1, 1999 (superseded document available); Amended by Laws 2000, SB 1516, c. 370, § 13, emerg. eff. July 1, 2000 (superseded document available); Amended by Laws 2007, HB 1760, c. 261, § 10, eff. November 1, 2007 (superseded document available); Amended by Laws 2008, SB 1992, c. 438, § 1, emerg. eff. July 1, 2008 (superseded document available).

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 39 - Oklahoma Law on Obscenity and Child Pornography
Section 1021.3 - Guardians - Parents - Custodians - Consent to Participation of Minors in Obscene Writings, Pictures, Etc.

Superceded Superceded Superceded
Effective: 11/01/2000

Cite as: O.S. §, __ __

A. Any parent, guardian or individual having custody of a minor under the age of eighteen (18) years who knowingly permits or consents to the participation of a minor in any film, motion picture, videotape, photograph, negative, slide, drawing, painting, play, performance or any other obscene material wherein the minor is engaged in or portrayed, depicted or represented as engaging in any act of sexual intercourse, in any act of fellatio or cunnilingus, in any act of excretion in the context of sexual activity, or in any lewd exhibition of the uncovered genitals or pubic area or areola of the breasts in the context of masturbation or other sexual activity, shall be guilty of a felony and, upon conviction, shall be imprisoned in the State Penitentiary for a period of not more than twenty (20) years or a fine of not more than Twenty-five Thousand Dollars

($25,000.00) or by both such fine and imprisonment. Persons convicted under this section shall not be eligible for a deferred sentence. The consent of the minor to the activity prohibited by this section shall not constitute a defense.

Historical Data

Added by Laws 1978, HB 1520, c. 24, § 2, emerg. eff. March 13, 1978; Amended by Laws 1986, HB 1972, c. 87, § 3, emerg. eff. July 1, 1986; Amended by Laws 1996, HB 2506, c. 37, § 3, eff. November 1, 1996; Amended by Laws 1997, HB 1213, c. 133, § 278, emerg. eff. July 1, 1997 (effective date amended to July 1, 1999, by Laws 1998, 1st Extr. Sess., HB 1002, c. 2, §§ 23-26, emerg. eff. June 19, 1998) (superseded document available); Amended by Laws 1999, 1st Extr. Sess., HB 1009, c. 5, § 181, emerg. eff. July 1, 1999 (superseded document available).

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 45
Section 1111 - Rape Defined

Superceded Superceded Superceded
Effective: 03/08/2002

Cite as: O.S. §, __ __

Multiple Amendments Enacted During the 2001 Legislative Session

Version One (as amended by Laws 2001, HB 1351, c. 51, § 4, emerg. eff. July 1, 2001, repealed by Laws 2002, HB 2924, c. 22, § 34, emerg. eff. March 8, 2002):

A. Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator under any of the following circumstances:

1. Where the victim is under sixteen (16) years of age; or

2. Where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent; or

3. Where force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person; or

4. Where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit; or

5. Where the victim is at the time unconscious of the nature of the act and this is known to the accused; or

6. Where the victim submits to sexual intercourse under the belief that the person committing the act is a spouse, and this belief is induced by artifice, pretense, or concealment practiced by the accused or by the accused in collusion with the spouse with intent to induce that belief. In all cases of collusion between the accused and the spouse to accomplish such act, both the spouse and the accused, upon conviction, shall be deemed guilty of rape; or

7. Where the victim is under the legal custody or supervision of a state agency, a federal agency, a county, a municipality or a political subdivision and engages in sexual intercourse with a state, federal, county, municipal or

political subdivision employee or an employee of a contractor of the state, the federal government, a county, a municipality or a political subdivision that exercises authority over the victim.

B. Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.

Version Two (as amended by Laws 2001, SB 716, c. 184, § 1, eff. November 1, 2001):

A. Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator under any of the following circumstances:

1. Where the victim is under sixteen (16) years of age;

2. Where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent;

3. Where force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person;

4. Where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit;

5. Where the victim is at the time unconscious of the nature of the act and this fact is known to the accused;

6. Where the victim submits to sexual intercourse under the belief that the person committing the act is a spouse, and this belief is induced by artifice, pretense, or concealment practiced by the accused or by the accused in collusion with the spouse with intent to induce that belief. In all cases of collusion between the accused and the spouse to accomplish such act, both the spouse and the accused, upon conviction, shall be deemed guilty of rape;

7. Where the victim is under the legal custody or supervision of a state agency, a county, a municipality or a political subdivision and engages in sexual intercourse with a state, county, municipal or political subdivision employee or an employee of a contractor of the state, a county, a municipality or a political subdivision that exercises authority over the victim; or

8. Where the victim is at least sixteen (16) years of age and is less than eighteen (18) years of age and is a student, or under the legal custody or supervision of any public or private

elementary or secondary school, junior high or high school, or public vocational school, and engages in sexual intercourse with a person who is eighteen (18) years of age or older and is an employee of the same school system.

B. Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.

Historical Data

R.L. 1910, § 2414. Amended by Laws 1981, c. 325, § 1; Amended by Laws 1983, c. 41, § 1, eff. November 1, 1983; Amended by Laws 1984, c. 134, § 1, eff. November 1, 1984; Amended by Laws 1990, c. 224, § 2, eff. September 1, 1990; Amended by Laws 1993, c. 62, § 1, eff. September 1, 1993; Amended by Laws 1995, c. 22, § 1, eff. November 1, 1995; Amended by Laws 1999, HB 1784, c. 309, § 2, eff. November 1, 1999 (superseded document available). Amended by Laws 2001, HB 1351, c. 51, § 4, emerg. eff. July 1, 2001; Amended by Laws 2001, SB 716, c. 184, § 1, eff. November 1, 2001 (superseded document available).

Oklahoma Statutes Citationized
Title 21. Crimes and Punishments
Chapter 45
Section 1123 - Lewd or Indecent Proposals or Acts As to Child Under 16

Superceded Superceded Superceded
Effective: 11/01/2003

Cite as: O.S. §, __ __

Multiple Amendments Enacted During the 2002 Legislative Session

Version One (as amended by Laws 2002, HB 2301, c. 110, § 2, emerg. eff. July 1, 2002, as amended by Laws 2002, SB 1536, c. 460, § 11, eff. November 1, 2002):

A. Any person who shall knowingly and intentionally:

1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age, or other individual the person believes to be a child under sixteen (16) years of age, for the child to have unlawful sexual relations or sexual intercourse with any person; or

2. Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16)

years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law; or

3. Ask, invite, entice, or persuade any child under sixteen (16) years of age, or other individual the person believes to be a child under sixteen (16) years of age, to go alone with any person to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and morality, as defined by law, with the child; or

4. In any manner lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any indecent manner or in any manner relating to sexual matters or sexual interest; or

5. In a lewd and lascivious manner and for the purpose of sexual gratification, urinate or defecate upon a child under sixteen (16) years of age or ejaculate upon or in the presence of a child, or cause or expose or force or require a child to look upon the body or private parts of another person or upon sexual acts performed in the presence of the child or force or require a child to touch or feel the body or private parts of said child or another person, upon conviction, shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not less than one (1)

year nor more than twenty (20) years. The provisions of this section shall not apply unless the accused is at least three (3) years older than the victim. Any person convicted of a second or subsequent violation of subsection A of this section shall be guilty of a felony and shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of subsection A of this section shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court. Any person convicted of a violation of this subsection after having been twice convicted of a violation of subsection A of Section 1114 of this title, Section 888 of this title, sexual abuse of a child pursuant to Section 7115 of Title 10 of the Oklahoma Statutes, or of any attempt to commit any of these offenses or any combination of convictions pursuant to these sections shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole.

B. No person shall commit sexual battery on any other person. "Sexual battery" shall mean the intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner and without the consent of that person or when committed by a state, county, municipal or

political subdivision employee or a contractor or an employee of a contractor of the state, a county, a municipality or political subdivision of this state upon a person who is under the legal custody, supervision or authority of a state agency, a county, a municipality or a political subdivision of this state.

C. Any person convicted of any violation of this subsection shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not more than five (5) years.

D. The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense pursuant to this section shall not constitute a defense to a prosecution under this section.

Version Two (as amended by Laws 2002, SB 1425, c. 455, § 6, emerg. eff. July 1, 2002):

A. Any person who shall knowingly and intentionally:

1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age for the child to have unlawful sexual relations or sexual intercourse with any person; or

2. Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner

by any acts against public decency and morality, as defined by law; or

3. Ask, invite, entice, or persuade any child under sixteen (16) years of age to go alone with any person to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and morality, as defined by law, with the child; or

4. In any manner lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any indecent manner or in any manner relating to sexual matters or sexual interest; or

5. In a lewd and lascivious manner and for the purpose of sexual gratification, urinate or defecate upon a child under sixteen (16) years of age or ejaculate upon or in the presence of a child, or force or require a child to look upon the body or private parts of another person or upon sexual acts performed in the presence of the child or force or require a child to touch or feel the body or private parts of said child or another person, upon conviction, shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not less than one (1) year nor more than twenty (20) years, except as provided in Section 3 of this act. The provisions of this section shall not apply unless

the accused is at least three (3) years older than the victim. Any person convicted of a second or subsequent violation of subsection A of this section shall be guilty of a felony and shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of subsection A of this section shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court.

B. No person shall commit sexual battery on any other person. "Sexual battery" shall mean the intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner and without the consent of that person or when committed by a state, county, municipal or political subdivision employee or a contractor or an employee of a contractor of the state, a county, a municipality or political subdivision of this state upon a person who is under the legal custody, supervision or authority of a state agency, a county, a municipality or a political subdivision of this state.

C. Any person convicted of any violation of this subsection shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not more than five (5) years.

Historical Data

Added by Laws 1945, HB 397, p. 95, § 1, emerg. eff. May 5, 1945; Amended by Laws 1947, HB 63, p. 232, § 1, emerg. eff. March 6, 1947; Amended by Laws 1951, HB 205, p. 60, § 1, emerg. eff. May 26, 1951; Amended by Laws 1955, HB 724, p. 186, § 1, emerg. eff. May 24, 1955; Amended by Laws 1965, SB 121, c. 97, § 1, emerg. eff. May 12, 1965; Amended by Laws 1981, SB 257, c. 206, § 1, emerg. eff. May 26, 1981; Amended by Laws 1983, HB 1120, c. 42, § 1, eff. November 1, 1983; Amended by Laws 1985, HB 1368, c. 112, § 4, eff. November 1, 1985; Amended by Laws 1989, HB 1406, c. 113, § 1, eff. November 1, 1989; Amended by Laws 1990, HB 2334, c. 224, § 4, eff. September 1, 1990; Amended by Laws 1992, SB 912, c. 289, § 3, emerg. eff. May 25, 1992; Amended by Laws 1997, HB 1213, c. 133, § 299 (effective date amended to July 1, 1999, by Laws 1998, 1st Extr. Sess., HB 1002, c. 2, §§ 23-26, emerg. eff. June 19, 1998) (superseded document available); Amended by Laws 1999, 1st Extr. Sess., HB 1009, c. 5, § 200, emerg. eff. July 1, 1999 (superseded document available); Amended by Laws 2000, HB 2349, c. 56, § 1, eff. November 1, 2000 (repealed by Laws 2000, SB 1608, c. 334, § 9, eff. November 1, 2000); Amended by Laws 2000, HB 2121, c. 175, § 2, eff. November 1, 2000; Amended by Laws 2000, SB 1608, c. 334, § 1, eff. November 1, 2000 (superseded document available); Amended by Laws 2002, HB 2301, c. 110, § 2, emerg. eff. July 1, 2002; Amended by Laws 2002, SB 1425, c. 455, § 6, emerg. eff. July 1, 2002 (superseded document available); Amended by Laws

2002, SB 1536, c. 460, § 11, eff. November 1, 2002 (superseded document available).